

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.
SIDNEY T. BURLEYSON,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Northern District of California,
Northern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

JOHN L. McNAB and S. C. WRIGHT, Esqrs., 1
Montgomery Street, San Francisco, California,
Attorneys for Plaintiff.

GEORGE J. HATFIELD, United States Attor-
ney, Post Office Building, San Francisco, Cali-
fornia,
Attorney for Defendant.

In the Southern Division of the United States Dis-
trict Court for the Northern District of Cali-
fornia, Second Division.

18,430—K.

SIDNEY T. BURLEYSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT.

The above-named plaintiff complains of the said
defendant, and for cause of action alleges:

I.

That at all the times herein mentioned plaintiff
was and still is a citizen of the United States of
America, and a resident of the City and County

of San Francisco, State and Northern District of California.

II.

That this action is brought under and by virtue of the War Risk Insurance Act and the World War Veterans' Act, and amendments and supplements thereto, and is based upon a term policy or certificate of war risk insurance issued under the provisions of the said War Risk Insurance Act, approved October 6, 1917, and acts amendatory thereto to the plaintiff by the defendant.

III.

That on or about the 30th day of July, 1918, at Paris Island, South Carolina, the plaintiff enlisted in the armed forces of the defendant; that he served defendant as a private of the United States Marine Corps until the 10th day of July, 1919, when he was honorably discharged from the said Marine Corps, and that during all of the said time he was employed in the active service of the defendant. [1*]

IV.

That immediately after enlisting in the defendant's said Marine Corps the plaintiff made application for insurance under the provisions of Article IV of the War Risk Insurance Act of Congress, and the rules and regulations promulgated by the War Risk Insurance Bureau established by said Act of Congress in the sum of ten thousand dollars (\$10,000) and that thereafter there was

*Page-number appearing at the foot of page of original certified Transcript of Record.

issued to plaintiff by the said Defendant's War Risk Insurance Bureau its certificate No. T — of his compliance with the War Risk Insurance Act, so as to entitle him and his beneficiaries to the benefits of said Act, and the other Acts of Congress relating thereto, and the rules and regulations promulgated by the War Risk Insurance Bureau, the Veterans' Bureau, and the directors thereof, and that during the term of his service with the said Navy Department as aforesaid, there was deducted from his pay for such services by the defendant through its proper officers the monthly premiums provided for by said Act of Congress, and the rules and regulations promulgated by the War Risk Insurance Bureau, the Veterans' Bureau, and the directors thereof.

V.

That during the month of April, 1919, and while serving the defendant in its said Marine Corps, the plaintiff sustained fallen arches in both of his feet, and which condition later developed into what is known as thrombo engitas obliteration. That said disability has continuously since the date of his discharge from the defendant's Marine Corps rendered and still renders the plaintiff unable to follow his former occupation of salesman, or any substantially gainful occupation; and such disability is of such a nature and founded upon such conditions that plaintiff is informed and believes, [2] and so states the fact to be, will continue throughout the lifetime of the plaintiff in approximately the same degree, or in a worse degree. That ever since his

discharge from defendant's Marine Corps plaintiff has been permanently disabled as a result of the injury sustained by plaintiff while in the service of the defendant as aforesaid, and is now wholly and permanently disabled as a direct result therefrom.

VI.

That the plaintiff made application to the defendant through the United States Veterans' Bureau, and the directors thereof, and through the United States Bureau of War Risk Insurance and the directors thereof for the payment of said insurance and for the monthly payments due under the provisions of said War Risk Insurance Act for total and permanent disability, and that said Veterans' Bureau; the said Bureau of War Risk Insurance, and the directors thereof have refused to pay to plaintiff the amount provided for by the War Risk Insurance Act, and the amendments thereto; and on the 14th day of December, 1926, disputed the claim of the plaintiff to the benefits of the said War Risk Insurance Act, and have refused to grant plaintiff said benefits, and have disagreed with him concerning his rights to the insurance benefits or such Act ever since the said 14th day of December, 1926, and still does disagree with him concerning the same.

VII.

That under the provisions of the War Risk Insurance Act, and the other Acts of Congress amendatory thereto, plaintiff is entitled to the payment of \$57.50 for each and every month transpiring since

the date of his discharge from the said defendant's Marine Corps, to wit: July 10, 1919, and continuously thereafter so long as he lives, and continues [3] to be permanently and totally disabled.

VIII.

That plaintiff has employed the services of John L. McNab, an attorney and counsellor at law, duly admitted to practice before this court, and all courts in the State of California. That a reasonable attorney's fee to be allowed to plaintiff's attorney for his services is ten per centum (10%) of the amount of insurance sued upon and involved in this action payable at a rate not to exceed one-tenth (1/10) of each of such payments until paid in the manner provided by Section 500 of the World War Veterans' Act of 1924.

WHEREFORE, plaintiff prays judgment as follows:

First: That plaintiff since the 10 day of July, 1919, has been, and still is, totally and permanently disabled as a result of an illness and/or injury contracted in the line of his duty while in the active service of the United States of America.

Second: That plaintiff have judgment against the defendant for all of the monthly installments of \$57.50 per month for each and every month from said 10th day of July, 1919, and so long as he lives and remains permanently and totally disabled.

Third: Determining and allowing to plaintiff's attorney a reasonable attorney's fee in the amount of ten per centum (10%) of the amount of insur-

ance sued upon and involved in this action, payable at a rate not exceeding one-tenth (1/10) of each of such payments, until paid in the manner provided by Section 500 of the World War Veterans' Act of 1924; and such other and further relief as may be just and equitable in the premises.

JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Plaintiff. [4]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Sidney T. Burleyson, being first duly sworn, deposes and says: That he is the plaintiff named in the above-entitled action; that he has read the foregoing complaint, and knows the contents thereof; that the same is true of his own knowledge; except as to those matters which are therein stated upon his information and belief, and as to such matters he believes it to be true.

SIDNEY T. BURLEYSON.

Witness:

J. A. BROOKS.

Subscribed and sworn to before me this 23d day of May, 1929.

[Seal] ALBERT J. BRYANT,
Notary Public for the City and County of San
Francisco, State of California.

[Endorsed]: Filed May 24, 1929. [5]

[Title of Court and Cause.]

ANSWER TO COMPLAINT.

The United States of America for answer to the complaint of plaintiff herein denies each and all of the allegations thereof.

WHEREFORE, defendant prays that plaintiff take nothing by his said action and that defendant have its costs herein incurred.

GEO J. HATFIELD (Signed).

GEO. J. HATFIELD,
United States Attorney.

GEO. M. NAUS,
Assistant United States Attorney.

CHELLIS M. CARPENTER,
Assistant United States Attorney.

Service of the within answer by copy admitted this 3d day of September, 1929.

JOHN L. McNAB,
Attorney for Plaintiff.

[Endorsed]: Filed September 5, 1929. [6]

[Title of Court and Cause.]

DEFENDANT'S PROPOSED BILL OF EXCEPTIONS.

To the Plaintiff Above Named and to Messrs. John L. McNab and S. C. Wright, His Attorneys:

You, and each of you, will please take notice that

the attached constitutes defendant's proposed bill of exceptions.

GEO. H. HATFIELD,
United States Attorney,
Attorney for Defendant. [7]

[Title of Court and Cause.]

ENGROSSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 16th day of October, 1929, the above-entitled cause came on for trial; Messrs. John L. McNab and S. C. Wright appearing for the plaintiff, and Messrs. Geo. J. Hatfield, United States Attorney for the Northern District of California, and Herman Van Der Zee, Assistant United States Attorney for said District, appearing for defendant; a jury was impaneled and sworn and an adjournment was then taken until October 17, 1929, upon which day the following proceedings took place:

TESTIMONY OF SIDNEY T. BURLEYSON,
IN HIS OWN BEHALF.

SIDNEY T. BURLEYSON, the plaintiff, called in his own behalf, being first duly sworn, testified:

Mr. McNAB.—It is stipulated, if your Honor please, between the United States Attorney and myself that there will be no necessity for offering any proof to the effect that the usual certificate

(Testimony of Sidney T. Burleyson.)

or policy issued after his enlistment in [8] the Marine Corps.

I have here, if your Honor please, one of the usual forms issued by the United States Government, and I ask that I may be permitted to offer that in evidence so that the jury may be familiar with the terms of it.

Mr. VAN DER ZEE.—No objection. May I be permitted hereafter to withdraw that as an exhibit, as it belongs to another person?

The COURT.—Yes.

Direct Examination.

My name is Sidney T. Burleyson, the plaintiff in this case. I am 29 years old; born January 4, 1900, in Bilien, Mississippi. Up to the time of my enlistment in the Marine Corps, I had been on a farm for years and then I went to work for about three months, I guess it was, in a drygoods store. Prior to that time I never worked at anything other than farming. I was 18 years old when I enlisted in the Navy; I enlisted at Memphis, Tennessee; I went, thereafter, to Paris Island, South Carolina.

I was discharged from the army on July 10, 1919; the document which you hand me is my certificate of discharge that was handed to me at the time of my discharge from the Marine Corps.

Mr. McNAB.—I offer this in evidence, if your Honor please.

Mr. VAN DER ZEE.—I will object to that, if your Honor please, upon the ground that it serves

(Testimony of Sidney T. Burleyson.)

no purpose at all. The witness has testified as to the date of his discharge. The record won't amplify that. [9]

Mr. McNAB.—It shows, if your Honor please, that he was discharged from the Army under the report of a medical survey.

The COURT.—The objection will be overruled. It will be admitted.

Mr. VAN DER ZEE.—Exception.

(The document was thereupon marked Plaintiff's Exhibit No. 1.)

The WITNESS.—My discharge from the Marine Corps was ordered; I made no application for discharge. After I commenced my service in the Marine Corps, I was stricken with influenza about November, 1918, at Quantico, Virginia.

Mr. McNAB.—How long were you in the hospital there?

A. About six weeks.

Mr. VAN DER ZEE.—Objected to as immaterial, irrelevant and incompetent. This is not one of the diseases mentioned in the complaint, nor is it alleged as one of the elements of his permanent total disability. The complaint restricts it to thrombus angiitis obliterans.

Mr. McNAB.—That may be quite true, but the medical evidence will show that these are essential elements of the progressive development of the disease.

The COURT.—The objection will be overruled.

Mr. VAN DER ZEE.—Exception.

(Testimony of Sidney T. Burleyson.)

The WITNESS.—Thereafter I was sent back to duty at Quantico, Virginia. I was transferred shortly after to the U. S. S. "Albany." The cold remained with me for a while and later on when I got to Pearl Harbor this other stuff developed, the appendicitis. During the time I was afflicted with influenza I was under the care of the Navy physicians on the steamship "Albany." [10]

Mr. McNAB.—Q. When did the appendicitis break out?

Mr. VAN DER ZEE.—Just a moment. Object to it as irrelevant, immaterial and incompetent and not within the issues of the complaint. It is not mentioned in the complaint.

The COURT.—The objection will be overruled.

Mr. VAN DER ZEE.—Exception.

Mr. McNAB.—Q. When were you affected with appendicitis?

Mr. VAN DER ZEE.—The same objection.

Mr. McNAB.—We will stipulate, if your Honor please, if it would save the Court any time, that the objections may be deemed to have been made.

Mr. VAN DER ZEE.—And exceptions?

Mr. McNAB.—And exceptions too.

The WITNESS.—In February, 1919. At the time I was stricken with appendicitis I was in Honolulu Harbor; I was taken to Pearl Harbor about nine miles away, where I had an operation for appendicitis. Soon after I got out of bed the doctors began to look around to see what was the

(Testimony of Sidney T. Burleyson.)

cause of it, and looked at my tonsils, which they said were in bad condition and had to come out.

Mr. VAN DER ZEE.—I will ask my objection and exception to the Court's ruling on all of these questions be allowed to run to questions except those affecting the particular physical disability mentioned in the complaint.

The COURT.—It will be so understood.

The WITNESS.—About twelve days after my operation for appendicitis I was operated on for for the removal of my tonsils. I had not been removed from my hospital cot at any [11] time between the operations. I was discharged from the hospital about twenty-three days after my last operation; I was pretty weak when I went to duty. I was on light duty for a while, and I could not tell the exact date I was ordered back to active duty. By light duty I mean work around the barracks; it was not considered much light duty because we had to carry garbage cans and things like that. I think I was *order* back to drill in about a week. After I was ordered back to drill and heavy duty I had terrible pains in my legs, down to my feet, and my arches dropped down then. It was within about twelve days that my arches dropped; at the beginning of the twelve-day period my arches were normal and at the end of that period they were down, they dropped clear down, there was no arch; that condition has existed ever since. It was accompanied with pain. My feet and lower limbs at that time just swelled up, I could hardly feel my

(Testimony of Sidney T. Burleyson.)

ankle; they swell up so big I cannot stand on them at all. When I went to the hospital for ten or twelve days, they were swelled up so big I could not use them at all. I was not able to stand up, not for a long time. That condition with regard to my arches and the flatness of my soles has not changed. I was sent to the hospital for about six weeks. I was sent from the hospital on board a ship and a medical survey was held out in the Islands and I was sent back on the ship to Mare Island and discharged there. I went through a medical survey at the Islands first; a board of doctors commanded they discharge me from service on disability. I had not made any application whatsoever for such a survey. That was ordered by my officers. From there I went back to Mare Island where I was discharged. None of this was on any application of mine. [12]

I could not get around at all; if I would move around a little bit it would get so painful sometimes that I would almost collapse. That extended up my legs; the swelling went up about half of my legs. Yes, I will remove one of my socks so that you may see the condition; that is the general appearance of it and if I move around much it will be bluer than this; for a long while, while I was working, there were running sores all over my toes; they would swell up and crack open, and matter and foreign material would come out. When I have endeavored to work they would all swell up; my toes would crack open and bleed like the dick-

(Testimony of Sidney T. Burleyson.)

ens; it got so painful that I could not stand up; I never have worked constantly. The skin would break open; it would swell up and break open, and the skin would come off, and it would be nothing but raw. It would disclose the red tissues underneath; that has been the result whenever I have endeavored to remain on my feet for any length of time. Since my discharge from the Marine Corps I have endeavored to work; I had to work; I had no other way of living.

At the time I enlisted in the Marine Corps I was subjected to quite a lengthy physical examination. After this trouble developed I made an application to the Veterans' Bureau for insurance but they turned me down; that is, my application has never been granted. After I came out of the service I first attempted to work as a clerk for the Government at Mare Island. I handled containers. When I was required to be on my feet they just got so bad, badly swelled up—I had a mighty fine boss, and he would let me off quite often, and I would go home and lift my foot until I got the blood back down again—it swelled up so bad, it [13] ached so bad, I put them on pillows and got relief that way. I was acting under a physician's instructions when I kept my feet lifted. The physicians told me I should keep off my feet, but I had to work to make a living. There has been no time since my discharge when I have been able to work continuously and without interruption. I have never worked over six weeks without having a day

(Testimony of Sidney T. Burleyson.)

off; it would get so bad I would have to be off. At other times I would have a greater length of time off. I had to finally quit work there at Mare Island.

Mr. McNAB.—Q. Why did you have to quit?

Mr. VAN DER ZEE.—I object to that as calling for the opinion and conclusion of the witness.

The COURT.—He can state what happened. The objection will be overruled.

Mr. VAN DER ZEE.—Exception.

Mr. McNAB.—Q. Why did you have to quit?

The WITNESS.—My feet got swelling up so badly I could not get around at all, I had to lay off for about a month and it did not do any good, I went back, but I could not stand on my feet; it required me to be on my feet quite a bit. I next worked for the Southern Pacific; I started to work as cashier. I had a stool that I sat on quite a bit. I think I worked there about two weeks or thirteen days something like that, and I laid off about three weeks before I went to work again, I think about that. I had to lay off the three weeks because my feet were in such bad condition that I could not get around. I have attempted to work from time to time. I have never been able to continue in any of these positions; my physical condition always compelled me to quit. It has been over a year now since I have [14] attempted to do any work at all. From time to time while I was in these various places attempting to work, I have had physicians attending me; I hired them and paid

(Testimony of Sidney T. Burleyson.)

them myself. They were giving me treatments during this period of time. They relieved me while I was off my feet, but when I went back to work again the same thing would come back again. The only time that I get any physical relief is while I am lying down and keeping my feet elevated to keep the blood down.

Mr. McNAB.—Q. What have your attending physicians advised you to do in order to get any kind of relief?

Mr. VAN DER ZEE.—Just a moment. Objected to as calling for hearsay.

Mr. McNAB.—I would not ask it if it were not for the fact that I expect to connect it up.

The COURT.—The objection will be overruled subject to a motion to strike unless it is connected up.

Mr. McNAB.—Q. What have you been advised by the physicians you must do in order to get relief?

A. I must keep off my feet and keep them elevated most of the time.

The WITNESS.—I have endeavored to follow that advice every day. I have had treatment in the Government hospital at Palo Alto twice since my discharge. I first went there last year, some time in July. I was there about six weeks, and then I was out for about seventeen days and went back, a little over six months. During the last six weeks I was there first they were putting iodine and things like that on my feet down there. It did not help

(Testimony of Sidney T. Burleyson.)

me any that I could see. Most of the time I was in bed. The first time I was there my feet were given some treatment and [15] then they recommended an operation; then when I went back they did not give it to me; they put my feet in casts up to here, plaster casts, very tight. I had to have them taken off they got so painful, in about four weeks. There was no improvement in my limbs; I could not walk then at all until I had those taken off. After I came away from the base hospital the second time I came to the Herald Hotel and I was there about twenty-five days, and I went into the Letterman Hospital, about the latter part of March. The attending surgeon at the Letterman Hospital was Major Murrell; he was the superior. I was under treatment there about four months; I was a bed patient. I came out June 28th; my condition had not changed at all that I could see, but I got out and walked around a little bit and they were swelling up again, so I stayed around the Herald Hotel for a day. Since I had these casts taken off my feet I have been using double crutches. That was in the base hospital at Palo Alto; that was in March. Prior to my having double crutches, I used a cane to assist myself.

Mr. McNAB.—Q. Have you been able to find any kind of work that you have been able to remain at continuously, however light?

A. No.

Mr. VAN DER ZEE.—I object to that as calling for the opinion and conclusion of the witness.

(Testimony of Sidney T. Burleyson.)

Mr. McNAB.—I think he ought to know.

The COURT.—The objection will be overruled.

Mr. VAN DER ZEE.—Exception.

Mr. McNAB.—Q. You say you know?

A. Yes.

Q. Do you know of any form of work that you have ever come in contact with that you are able to remain at? A. No.

Mr. VAN DER ZEE.—The same objection. [16]

The COURT.—The objection will be overruled.

Mr. VAN DER ZEE.—Exception.

Cross-examination.

(By Mr. VAN DER ZEE.)

I made application for the relief mentioned in my policy of War Risk Insurance. At the time that I filed my application for compensation, one of the members of the Board that was there when the application was made out—I asked him about the benefits under that, and he said, “No, you are not entitled to any.”

Mr. McNAB.—I neglected to ask one question:

Q. At the time of your discharge from the Army, did you cease paying your premiums on your policy or did you continue to pay them?

A. I paid them for about six or seven months.

Q. After your final discharge from the Army?

A. Yes, sir.

Q. And during all that period of time you were afflicted as you are now? A. Yes.

(Testimony of Sidney T. Burleyson.)

Mr. VAN DER ZEE.—Q. You say you made a claim for the insurance benefits?

A. Yes, sir.

The WITNESS.—The date I applied for compensation was December 14, 1926; I asked at the same time a member of the *aboard* about insurance benefits, and he said you would have to be totally disabled at the time before you could get it. That is what I was told. December 14, 1926, is the first time that I made any claim of any character for compensation insurance or any other relief from the Government; the man on the rating board turned me down; I don't know his name; he was on Rating Board No. 3. [17] I have never received any communication from the Director of the United States Veterans' Bureau denying any claim of mine for War Risk Insurance benefits. I was discharged from the service on July 10, 1919. I first went to work, after leaving the service, for the Government at Mare Island. They did not give an examination for that position; just went over you in a way. It was a Civil Service position. They just examined my heart; yes, I had to pass a physical examination. I was given a clerical position in the Supply Department. I was container recorder; I handled the serial numbers on the gasoline tanks and things like that. I was known as a store man. That was in 1919.

Mr. VAN DER ZEE.—Q. In 1919 didn't you work as rivet heater?

A. They gave it a rating of that.

(Testimony of Sidney T. Burleyson.)

Q. Didn't you work during 1919 as a machinist's helper for a period of approximately six months?

A. That was the same thing.

Q. What work did you actually do? I would like an answer to that question, whether you worked at it or not. I want an answer to the question. Did you work as a rivet heater? A. All clerical.

The WITNESS.—I worked as a storeman; I was at the Navy Yard on those various jobs during all of 1919 after my discharge; my employment continued from July, 1919, to August, 1920. After I left that position I was next employed with the Southern Pacific at Tracy. I was cashier in the restaurant. I do not remember just exactly the date that I went to work there it was some time in the latter part of August or September. I did not go there directly from my Mare Island employment. I got a thirty-day leave of absence, they granted it to us at the end of the year, so I did not [18] work the thirty days. I was on the Government pay-roll but I was on vacation. I was off a month there; I was treating myself there for a month. I worked for the Southern Pacific as cashier in the restaurant department—well, I was off for about—let me see; my first work was about fourteen days, and the next was about seven months, six or seven months. I worked two weeks and laid off, for about a *a* month, and I worked then for about five or six months, something like that. I was not working every day. A lot of that time I was off. I was not on that job all of that time be-

(Testimony of Sidney T. Burleyson.)

tween August, 1920, and November, 1922. I was only on there about fourteen days, first. After fourteen days, I was off for a while and went to Yuma, Arizona, for the Southern Pacific; I worked in the clubhouse as a clerk. I stayed at that employment about five or six months when I quit. I was off a number of times during that period of time. When I applied for employment by the Southern Pacific I was subjected to a physical examination; I passed one physical examination applied by the Southern Pacific Company upon application for employment. At that time they did not tell me of any disability of the feet; the doctors did not ask me if I had any disability of my feet.

The photostatic copy of a writing which you show me is signed by me; it is my signature. I do not recall where I have seen that writing before. All I did was, they asked me to sign my signature; I never looked over that. It is my signature. Yes, I recall an examination by Dr. Mangin, of the Southern Pacific, on July 6, 1923. I went in there but I did not go to work; I went up to Lake Tahoe instead. I recall my answers to his questions as to my physical condition, regarding various organs at that time. [19] I do not just recall that he asked me from what diseases I had suffered and when. I don't remember that the doctor asked me if I had any diseases of the feet. The photostatic copy you show me purporting to be a physical test record—yes, that is my signature. Referring to the balance of that report, I recall now a second physi-

(Testimony of Sidney T. Burleyson.)

cal examination; yes, I went in there; I did not go to work. That is what I meant to say; I did not go to work; yes, I now recall that there were two physical examinations given me by the Southern Pacific Company. My last employment by the Southern Pacific Company was in 1923, I think; I did work for them off and on. The last time I worked for them was 1923. My salary at that time was \$90.00 a month and found, I think.

I was next employed as a hotel clerk at the Merritt Hotel in Oakland for about a month and a half. I do not remember what my salary was there. After that I worked for the Emporium in San Francisco; I worked there, but I was off a number of times during that time; I was not working consecutively. I was given a physical examination upon going to work there, just my heart and lungs, that is all. After that examination, I was given employment by the Emporium. I recall working in the Hotel Del Monte in Monterey for about two months; I was employed in the storeroom there. My salary there was about \$50.00 a month and found.

In 1925, the first of that year, I went to work for the Fox Hotel, in Taft, California; I worked there for something like a year and a half, but I did not work steady; I was off a number of times during that time. I started at a salary of \$125.00; that did not include my [20] board. I was night clerk at the hotel. I left the employment of the Fox Hotel in Taft in June, 1926, or thereabouts; I laid off; I was feeling so bum I laid off for a

(Testimony of Sidney T. Burleyson.)

long while. I was off for a month, then I went to work as a hotel clerk at Tahoe Tavern; I worked there about three months until October 26th, then the season closed, but I could have gone back there, but the doctor told me if I came back there in winter time he said I would be frostbitten and I would lose my legs. The Tahoe Tavern closed for a few months and opened in December. My salary on that job was \$125.00 and found. When I left the Fox Hotel in Taft I did not know anything about where I was going. Yes, I got a larger salary at Tahoe Tavern. I met one of my friends downtown and I told him I had left down there, Mr. Smith, the Assistant Manager of the Whitcomb Hotel—yes, I got a larger salary at the Tahoe Tavern than at the Fox Hotel in Taft, but I could not hold the job, I got so bad. I next went to work for the Whitcomb Hotel in San Francisco as clerk. I worked there about five weeks. My salary there was \$90.00 and meals. I got so bad, my feet began to swell up, and I could not stay there and I quit. I was off for a month or six weeks. I took a rest and went up to the Granada Hotel. I was there just a short time at the Granada and then I laid off, got so bad with my feet I could not stand it, so I left there and was off about six weeks and went to work at the Worth Hotel. My salary at the Worth was \$125.00, straight salary. I worked there a little over a year. I left my employment at the Worth Hotel the latter part of June; somewhere thereabouts, or May; but I was in the Palo Alto Hospital

(Testimony of Sidney T. Burleyson.)

in August; I could not have been at the Worth Hotel in August. I went to night school for a while [21] during the time I was working at the Emporium. I went for about two or three months, something like that. I do not think it was nearer six months. My attendance at night school was irregular.

While I was working at the Worth Hotel I went every day for almost a year, taking treatments, as the records will show—I took treatments down at the Veterans' Bureau for almost a year, or over a year, nearly every day. They were light treatments for the broken skin and sores. Dr. Jeppel and Dr. Casey gave them to me. They did not make a thorough examination. They sent me to Dr. Alderson and Wade, and they told me I should be in the hospital. I called up the Veterans' Bureau and told them, and I went down there, and they sent me to Palo Alto Hospital. I went there for observation and treatment. I don't remember the exact day I went to Palo Alto.

No, I did not at any time before the year 1926 make any claim at all for disability compensation on the United States Government. I signed a waiver—I would like to explain that if you do not mind. When I left the service in 1919 I had to sign a waiver, and so up until that time I didn't know whether I had any claim or not, but I got so bad, and I saw one of the veterans, and was talking to him, and he said, "Why don't you go down to the Bureau?" and so when I went down to the Veterans'

(Testimony of Sidney T. Burleyson.)

Bureau they told me, "You should have come in before." I would have gone there before, but I didn't think I had any claim. He told me that waiver did not mean anything. I do not recall how that waiver read. I only mention that because this other veteran told me what I have just related. At any rate, I made no claim upon the United States Government or did not go to the Veterans' Bureau or any other branch of the Government [22] for relief until 1926.

Redirect Examination.

(By Mr. McNAB.)

When I left the service, before I got my discharge at Mare Island I had to sign this waiver of any claim. I read part of it, and it said, "I waive all claims for treatment in the hospital and for any compensation." I thought that ended my claim. I was first informed that my signature on such a waiver amounted to nothing on December 13, 1926. I went the following day to the Veterans' Bureau. The Bureau did tell me they would not grant me disability. I was orally informed to that effect by one of the members of the rating board number three here in San Francisco. I have never been granted insurance on the basis of total disability. After being so informed, I commenced this suit. A number of places have been mentioned here where I have been employed, seven or eight, my employment at each one of them terminated because I would get so bad I had to quit and take a rest. I

(Testimony of Sidney T. Burleyson.)

never would advise the people where I was employed of my condition because I figured that would hurt my getting another position after I got out. When I left their employ finally I had no dispute with any of them, it was just on account of my physical condition. In these night clerk jobs I was not required to be on my feet very much. For instance, taking the Hotel Worth, my hours there were from eleven at night to seven in the morning. I had very little to do there. I had a big wicker chair and I used to sit with my feet up like this most all night long, because the doctors had advised me to do that, to keep off of them as much as I possibly could. I sometimes wrapped a blanket around me. [23]

Mr. McNAB.—Q. Was there any work heavier than that that you were able to perform?

Mr. VAN DER ZEE.—Objected to as calling for the opinion and conclusion of the witness.

The COURT.—The objection will be overruled.

Mr. VAN DER ZEE.—Exception.

The WITNESS.—No.

I went to the Veterans' Bureau for about a year for treatment. I did not get any better. I never had my feet examined by any Southern Pacific official. When I went looking for a job, I was not telling them of my trouble with my feet; if I had I would not get a job.

Mr. McNAB.—Will the United States Attorney now admit that, at the end of this prolonged examination, which he has spoken so volubly, by the

(Testimony of Sidney T. Burleyson.)

Southern Pacific, that the Southern Pacific rejected this man at that time? Then I offer it in evidence. Do you object to it?

Mr. VAN DER ZEE.—No.

(Document marked Plaintiff's Exhibit No. 2.)

The WITNESS.—I never occupied a position as rivet heater. I do not know anything about rivet heating, nor do I know anything about working as a machinist. I was working as a clerk all the time I was there. I am a resident of the City and County of San Francisco, State of California, and have been ever since my discharge from the service. I am a United States citizen.

TESTIMONY OF WILLIAM COOPER EIDENMULLER, FOR PLAINTIFF.

WILLIAM COOPER EIDENMULLER, called as a witness on behalf of the plaintiff, being first duly sworn, testified: [24]

I am a physician and surgeon practicing in the City of San Francisco. I am a graduate of the College of Natural Sciences of the University of California and the Medical Department of the University of California; I had my preliminary training for admission as a physician and surgeon in San Francisco; I have been engaged in practice about twenty-three years. My practice is general. I have known the plaintiff in this case, Sidney Burleyson, since some time in the spring of 1927. He came to me as a patient at that time. He has been under my care and observation periodically from

(Testimony of William Cooper Eidenmuller.)

August, 1927, to date. I have tried to diagnose the trouble from which he is suffering. First I will medically, or technically, describe the character of the disease so that the jury may be able to understand it. It is a chronic affection of the blood vessels, namely, arteries and veins, chiefly, of the hands and feet and fore-arm and lower leg; and by lower leg I mean the lower extremities from the knees down. It apparently originates as an acute inflammation inside of the blood vessels, and ultimately results in thrombo angiitis obliterans. Now, if you would like me to give it in plain English I will. We all understand what the term "blood vessel" means. The blood vessels consist of arteries that carry blood to all parts of the body. The majority of the blood vessels in the body are necessary; some could be dispensed with and some could not. The other branch of the blood system consists of veins which carry the blood back from all parts of the body; and most of them are necessary. In this condition the blood vessels in question become inflamed and they become filled up more or less with inflammatory tissues, and due to that they cannot carry the blood to the parts that are ordinarily [25] supplied by them, that is, the arteries cannot, and if the veins are affected they cannot carry the blood back to the center of the body which has already been carried to those parts; and if enough arteries carrying blood to a part of the body are affected, filled up closely so that the blood cannot pass through them, the part that they supply is

(Testimony of William Cooper Eidenmuller.)

going to die from lack of nutrition, lack of food; when it does that we say that gangrene has set in, and that part has to be kept from the rest of the living body. The danger is it will tend to spread to the adjoining live tissues, to say nothing of the danger to the life of the patient.

In the course of my treatment of Mr. Burleyson I examined into the history, his medical history, and in the diagnosis of the disease I considered that history; also in my treatment of him. We do not know the specific cause of the disease. A great many causes have been advanced. One of the earlier causes advanced was excessive poisoning from the use of tobacco; another cause given a great deal of consideration was excessive use of alcohol; another cause was it was an incident to a disease known as syphilis; another cause was faulty diet, excessive consumption of starch and carbohydrates, producing a high-blood pressure, and in some way bringing about the local conditions that I have already spoken of. Other causes considered are heredity and racial characteristics in that the instances of the disease in a majority of cases is among people of Jewish blood. Another group of causes is the mode of life of those who are and have been afflicted, that, in the majority of cases, are among the poorer class, in the middle class, and the majority of cases have occurred in the colder countries of the world, and parts of other countries that are the coldest. [26] So that it is generally looked upon as being the result directly of infection in

(Testimony of William Cooper Eidenmuller.)

that living germs may travel to and lodge in the vessels that are affected, or that poisons that are produced by germs in other parts of the body may concentrate in those parts that are affected and produce the changes that we have already spoken of, or that chemical poisons produced by faulty food or faulty functioning of any or various of the several organs of the body produce the changes which I have described.

In my examination into the medical history of Mr. Burleyson, I considered certain conditions that he suffered from, that I looked upon as perhaps the most predisposed to leading to this condition. They were influenza, acute appendicitis, chronic tonsolitis, and the condition of the feet known as flat feet. To my knowledge none of the various causes I have mentioned that have been discussed by branches of the medical industry,—tobacco or intoxicants or syphilis, existed in Mr. Burleyson. Whatever the cause, it is my opinion that he has the disease. There is not any specific cure known.

Mr. McNAB.—Q. What will be the inevitable termination of his trouble?

A. Well, in the majority of cases they lose one or more toes, and furthermore including portions or all of the lower legs.

Mr. VAN DER ZEE.—Just a moment. I ask that that be stricken out upon the ground that the answer is not responsive. The doctor is stating as to the majority of cases. The question is, what will happen in this case.

(Testimony of William Cooper Eidenmuller.)

The COURT.—The motion to strike will be denied.

Mr. VAN DER ZEE.—Exception.

The WITNESS.—Unfortunately amputation is necessary [27] in a great majority of cases. That is about as far as I can go. In other words, I would not be at all surprised if that would be the ultimate outcome in this case. Some do avoid it, escape it, but they are in the great minority. As to whether or not he would be in a better condition at the present time if his feet were amputated than to remain in his present condition, I always leave a serious question like that up to the individual, because if they are taken off they never can be put back. I always leave a decision like that up to the patient; I cannot suffer for him and feel his pain, but in my opinion, from my observation of him since 1927, I would not be surprised if that is the ultimate outcome in his case. If they were removed he would be free from all the suffering that is caused by the condition in his feet. The thing has gone on, in my opinion, for ten years, and he has had considerable treatment, and to-day there has not been any improvement, and I really—of course, I do not like the patient to hear a thing like that, but I really do not look for much improvement.

Bearing in mind that any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation is a total disability, in my opinion he is most emphatically, most decidedly, totally

(Testimony of William Cooper Eidenmuller.)

disabled within that definition. The disease from which he is suffering is in my opinion permanent. During the period of time that he has been under my care, I have advised him to do everything in his power to promote the circulation in his feet and lower legs; I have advised him to change the position of the feet and lower legs just as frequently as he can; not to leave them in one position or at one angle of elevation more than a few minutes at a time. I believe that is one of the greatest factors that we [28] have in lightening the time that they are to keep on their feet and legs; the slightest little movement will open up practically a collapsed vessel and let a little blood through for the time being, and then after a short time the circulation seems to cease in that portion and a little further movement or a little slight variation in the angle of the elevation will start the blood going in other vessels that are affected. That man has been instructed to spend his entire time, devote his entire time to the care of the feet and legs; he is just as busy, in my opinion, as he should be, taking care of his legs and feet. I have advised him to use external heat. I have instructed him at night when he goes to bed and puts his legs in a position, vertical or horizontal, that he should not leave them that way too long; that if he is awakened by pain, to change the angle of elevation and move them, and go to the bathroom and run the hot water in the tub and bathe them, and in that way promote the circulation and bring them back more to life nor-

(Testimony of William Cooper Eidenmuller.)
mally for the time being. This restoration of circulation is accompanied by a great deal of pain; it is more or less of a constant agony all the time. Theoretically they are short, stab-like pains.

In my opinion he is in a condition to do no work, except to take care of his own feet and legs. If he does do any work beyond simply taking care of himself he may be jeopardizing the length of time he is going to keep his feet and legs or his life. Gangrene occurs in the majority of cases and amputation is the only relief. In my opinion his present trouble will continue throughout the remainder of his life. [29]

Cross-examination.

(By Mr. VAN DER ZEE.)

According to my ledger I saw Mr. Burleyson for the first time on August 22, 1927. I was called to his house, according to the ledger, as his private physician, I guess. I am reading from a copy of certain items taken out of my ledger. They are in the handwriting of Mrs. Eidenmuller. The only thing I personally recollect about this man's case is from my memory, but I wrote one report concerning his case to some branch of the Government, and I attended a hearing or conference before some Governmental body to have his disability increased in the matter. I am a general practitioner; I am not a specialist in these particular diseases; if I were I think I would starve to death. Mr. Burleyson is the only case of this particular kind I have treated, but I would like to add to that an explana-

(Testimony of William Cooper Eidenmuller.)

tion. At the same time when I was attending Mr. Burleyson for the condition that he has, I was attending another employee of the same hotel with a condition nearer to Mr. Burleyson's condition than anything else in medical annals, called "raynos," and is so similar that up to twenty-five years ago in this country they were classed under the same general head, and in making the diagnosis in this other case I was able to become enlightened considerably as to the condition that Mr. Burleyson is in, and the net result of those two diseases is about the same; in fact, the other man has since lost both feet and legs below the knees.

I prescribed for Mr. Burleyson at that time treatment that could be classed under the head of—general head of physiotherapy. I did not at any time prescribe amputation. No; I did not state my opinion to be that amputation is [30] absolutely necessary in this case; I said this morning that in a serious matter of that kind I always leave the decision to the patient. As far as amputation is concerned the operation would tend to remove from the rest of his body the affected parts, and if it did that he would no longer have that condition, and then, unless it extended, he would be free from the suffering that he is now enduring. During part of the time at least that he was under my care he was also under the care of the Government in hospitals and receiving treatment, so I was not the physician to the full extent I could have him solely in my care. I did not say that amputation was advisable; I said

(Testimony of William Cooper Eidenmuller.)

that a majority of these cases come to amputation, and further I will say that I have not advised at this time that amputation be performed.

This disease is not a result of what is known commonly as flat feet; the specific cause, as I testified this morning, is not *known*, as far as I know, and as far as the authorities know. This man has flat feet. That can be looked upon as a predisposing cause in that it would doubtless incorporate some features that are affected by this condition.

I think if he is able to take good care of his feet and legs and keep them on he ought to be considered fully employed.

Redirect Examination.

To my knowledge there is not any particular specialist in the treatment of this disease as a specialist. It is apparently rather a rare form of disease. I have studied quite a few authorities that are available on the subject. I have never met anybody in the profession who has professed [31] to be a specialist in the treatment of this particular disease. When I say that I have not thus far advised amputation I do not mean to say that amputation may not ultimately be necessary. In the event that gangrene sets in instant amputation would be absolutely necessary to save life. The other case which I described as a very similar condition has required that; the amputation of both limbs below the knees.

(Testimony of William Cooper Eidenmuller.)

Recross-examination.

(By Mr. VAN DER ZEE.)

I have stated that there are doctors who have handled a larger number of cases than I have and that by reason of that experience and also by reason of special training they know more about the treatment of this case than I do. When I first saw this man he was using double crutches. When I first saw the man he was acting as a night clerk in the Hotel Worth, and on a good many occasions when I saw him, I am not sure that it was the first time, he was sitting in a chair with his feet and legs propped up on another, with a blanket around them, and naturally I became inquisitive when I saw that thing repeatedly from time to time, and I became interested in his case. Yes, he called at my office. He walked into my office; I can recall pretty well during the entire part of 1929, I believe he had crutches, and I think in 1928, too. I cannot recall that there ever was any occasion when he walked into my office without the aid of the crutches; there might have been.

Mr. McNAB.—Your Honor, at the adjournment the [32] United States Attorney advised me for the first time of a contention that he might raise in this case; I was not advised of it before. If that contention is going to be raised I would like to call the plaintiff back and ask him a question to make the record perfectly clear on a certain subject.

(Testimony of Sidney T. Burleyson.)

The COURT.—Can you examine him where he is?

TESTIMONY OF SIDNEY T. BURLEYSON,
IN HIS OWN BEHALF (RECALLED).

Mr. McNAB.—Q. Mr. Burleyson, this morning you were asked concerning making application or demand on the Veterans' Bureau for your War Risk Insurance. Did you make such a demand?

A. Yes, sir.

The WITNESS.—That was about that date that I discussed this morning concerning some other demand that was filed; that was at San Francisco. I told them I was unable to do any work and asked if I was entitled to ask for the benefits of my War Risk Insurance and they told me it was impossible to obtain it. They never changed that ruling, and that is why I brought this suit.

Cross-examination.

(By Mr. VAN DER ZEE.)

I made a demand for my War Risk Insurance payments; I asked a member of the rating board; when I say "the board" I mean the Rating Board of the Veterans' Bureau. I do not remember the names of any of those men; it was Rating Board No. 3. I did not make any written application for those payments. I never received from the Rating Board or anybody else a written statement of their denial of my claim for insurance benefits;

(Testimony of Sidney T. Burleyson.)

I asked them and they told me it was no use; I did not receive any written denial. I never received any communication, written or otherwise, [33] from the Director of the Veterans' Bureau with respect to my War Risk benefits.

Mr. McNAB.—If your Honor please, at this time we wish to introduce a document which appears to be a report or a diagnosis on the condition of Sidney Burleyson, signed by C. L. Hoy, Major in the Marine Corps, Officer in Charge, and this was made at the Presidio, San Francisco. (Reading.)

TESTIMONY OF HARRY A. PESCHON, FOR PLAINTIFF.

HARRY A. PESCHON, called as a witness on behalf of the plaintiff, being first duly sworn, testified:

I am a police officer connected with the Detective Bureau in the city; in the Identification Bureau. I know the plaintiff, Mr. Burleyson. I saw him in Ward 4 at the diagnostic center in the Base Hospital at Palo Alto; I knew him to be there during the time that I was there, from the first week in January of this year to the middle of February. He was still an occupant of the hospital at the time I left; he was a bed patient. I don't know just what the doctors were doing with him, but I do know that both of his legs were in a plaster cast the entire time with the exception of the last week that I was there. He was in a surgical bed,

(Testimony of Harry A. Peschon.)

so that part of his body could be raised, and his feet were elevated. They were both in a plaster case. He did not say that he was in pain but he stayed right in bed all the time that I was there.

Cross-examination.

(By Mr. VAN DER ZEE.)

He did not tell me what he was there for or what he was being treated for. [34]

TESTIMONY OF G. H. SIMPSON, FOR
PLAINTIFF.

G. H. SIMPSON, called as a witness on behalf of the plaintiff, being first duly sworn, testified:

I am an engineer, railroad construction. I know the plaintiff Sidney Burleyson; I have known him for two and a half or three years. When I first knew him, he was night clerk at the Hotel Worth. I had occasion to observe him while he was attending to his duties there; it was during the nighttime. He kept off his feet as much as he could. He served from eleven at night until seven in the morning. During that period of time there were very few people coming and going. I did not observe his general condition with regard to his ability to get about at first, but I did so later on. I noticed he had difficulty in walking around. At that time he was not using crutches. He seemed to walk as if his feet hurt him. He did not impress

(Testimony of G. H. Simpson.)

me as a man who was able to carry on any continuous work.

Cross-examination.

(By Mr. VAN DER ZEE.)

I have not any idea how many hours a night he would work on that job. I was not working with him. I came in early in the morning and noticed him sitting in a chair with his feet propped up. I found out later the cause of it; it was due to trouble with his feet. I noticed that his arches had fallen. I looked at his feet. He had on a pair of oxfords. From the appearance down here (illustrating), it looked as though the arches had fallen. I presume he was on the job about a year. I think he was on from eleven at night to seven in the morning.

So far as I know he performed no work during the daytime. [35]

TESTIMONY OF F. W. SMITH, FOR PLAINTIFF.

F. W. SMITH, called as a witness on behalf of the plaintiff, being first duly sworn, testified:

I am proprietor of the Herald Hotel. Part of the time for the last eighteen months off and on Mr. Burleyson lived at my hotel. During that time I gave him no employment whatever. During the times that he has been at the hotel I have had occasion to observe his condition. When he first

(Testimony of F. W. Smith.)

came to the hotel, I think about May of last year, he was having trouble with his feet, and was using a cane, and after he was there about two months he went down to the Palo Alto Veterans' Hospital. I know of my own knowledge that he had gone to the Base Hospital at Palo Alto. His condition was much worse when he returned. My recollection is he came back to the city after about twenty-five days or so, and then he went to the hospital again and stayed down there for some considerable time, I think. I don't remember the exact date, but four or five months; and when he came back he was much worse; he was on crutches. We naturally noticed when he came back he was around the hotel and he could hardly walk; he just used these crutches. He could not hold one position very long; we never said anything to him but he would sit down for about half an hour, and then he would get up and walk some place else, or go to his room, but he seemed to be much worse when he came back from the hospital. During the time that I observed him, he was not performing any labor of any kind whatever. He did not during any of the time he was there perform any labor, nor do anything other than care for himself. [36]

Cross-examination.

(By Mr. VAN DER ZEE.)

He was a roomer at my hotel. He first came there in May of last year and stayed until some time in July, and then went to the hospital for I

(Testimony of F. W. Smith.)

think about twenty days or so, and then came back and stayed for a very short time, and then went down to Palo Alto and stayed down there I think four or five months, and then came back to the hotel for a short time and went out to the Letterman Hospital. I was in touch with Mr. Burleyson while he was at the hospital; I was forwarding mail to him and telephoning him. I met him for the first time in May of last year, I think.

Mr. McNAB.—I should like to offer in evidence at this time a report of the physical examination of Sidney Burleyson conducted by Major Mariella, of the Letterman Hospital, bearing date March 29, 1929 (reading).

I offer in evidence, if your Honor please, the diagnosis of Doctor M. T. Maynard, at the Veterans' Bureau, concerning statements as to the condition (reading).

TESTIMONY OF J. A. BROOKS, FOR PLAINTIFF.

J. A. BROOKS, called as a witness on behalf of the plaintiff, being first duly sworn, testified:

I am a cigar clerk. I live at 154 Ellis Street; I know the plaintiff Sidney Burleyson, and have known him for about seven years. I have had occasion to observe his habits, they are regular; he does not use anything that would disturb his system. I have had occasion to observe the development of his trouble. He seems to suffer pain; he is get-

(Testimony of J. A. Brooks.)

ting worse, I believe. I have seen him before and after his visits to the various hospitals which have been [36-A] described here. Before his visit to the hospital at Letterman and Palo Alto. After his return from those hospitals there did not seem to be any improvement in his condition. He seems to suffer pain. During the time I have observed him he seemed to be taking the best of care of himself, resting all that he could. I believe it has been about a year and a half since he has been engaged in any form of labor. Prior to that time he was never continuously employed at anything, to my knowledge.

Cross-examination.

(By Mr. VAN DER ZEE.)

I reside in San Francisco and have during the seven years I have known Mr. Burleyson. I believe during all of those seven years except the last he has been working outside of San Francisco. During the time he was working outside of San Francisco I did not see him at all.

Mr. McNAB.—That is plaintiff's case, if your Honor please.

Mr. VAN DER ZEE.—If your Honor please, I desire at this time to move for nonsuit upon the ground, first of all, that the disagreement with the director, which is required by the Act, has not been established.

The second ground is this, that by the evidence of the plaintiff, himself, particularly on cross-examination, it is established that he made no claim

(Testimony of A. J. Whalen.)

for physical disability until 1926, and that prior to that time, and beyond that time, up to 1928, he was practically continuously employed at various occupations.

(After argument.)

The COURT.—The motion will be denied. [37]

Mr. VAN DER ZEE.—Exception. At this time I desire to move for a directed verdict in favor of the defendant upon the grounds that all of the evidence of the plaintiff so far fails to make out a *prima facie* case, that no disagreement has been established, that the disagreement is one of the material allegations the complaint put in issue by the general denial, and that no denial of any claim for war risk insurance benefits by the director of the Veterans' Bureau has been shown by the evidence.

The COURT.—The motion for a directed verdict will be denied.

Mr. VAN DER ZEE.—Exception.

TESTIMONY OF A. J. WHALEN, FOR DEFENDANT.

A. J. WHALEN, called as a witness on behalf of the defendant, being first duly sworn, testified:

I have the Veterans' Bureau record showing the date of lapsation of the policy of the plaintiff in this case. The last premium was paid to include January, 1920, so the insurance lapsed January 31, 1920.

(Testimony of A. J. Whalen.)

Cross-examination.

(By Mr. McNAB.)

In other words, he paid for seven or eight months after his discharge from the Army; he was discharged in July, 1919, and it lapsed as of January 31, 1920.

TESTIMONY OF DR. EDWIN A. HOBBY, FOR
DEFENDANT.

DOCTOR EDWIN A. HOBBY, called as a witness on behalf of the defendant, being first duly sworn, testified:

I am a physician connected with the United States Veterans' Bureau. I am doing the general surgical and [38] orthopedic examination. Orthopedic means diseases or injuries of bones and joints. I know the plaintiff in this case, Mr. Burleyson. I have examined him at the Regional Office of the United States Veterans' Bureau, on three different occasions. The first time was December 15, 1926, when he came up for an examination on a claim for disability. I made a diagnosis at that time. He had what is commonly called flat feet. I did not give him a general examination. I examined him as to his complaint. He gave me a history of having been operated on in 1919 for appendicitis, and his tonsils, and following that operation his feet began to bother him; and soon after that he was discharged on a surgeon's certificate of disability. He said that he had complained

(Testimony of Dr. Edwin A. Hobby.)

of his feet ever since that time; he gave his history as having gonorrhoea nine months previous to my examination, and his present complaint was pain in his feet, after standing or walking much. That is all the history he gave to me which pertained particularly to his feet. I found that his feet had the appearance of being congenitally broad and flat, and somewhat pronated. They were not rigid, and he was able to stand on his toes with good strength. They were not swollen at that time. Bearing in mind the diagnosis of permanent total disability with the terms of the Act which I have heard here and with which I am familiar, I would say he was not at that time totally disabled from following continuously any substantially gainful occupation. He was not permanently and totally disabled from the standpoint of following continuously a gainful occupation. There was not anything in his physical condition, from the standpoint of his feet, to prevent him from following any occupation, I do not care what. [39] The next examination was on February 27, 1928, and he gave a history at that time of having complained of his feet while in service, and having been discharged on medical survey. He said his feet began to swell in 1922, or rather, 1923, and that his toes got sore after that. His present complaint came from the arches of his feet, swelling and soreness of his toes, sometimes got sore under the anterior part of his feet, has been receiving treatment on the outside, that is, outside of the Veterans' Bureau, by private

(Testimony of Dr. Edwin A. Hobby.)

physicians probably, and in the Out-patients Department of the Veterans' Bureau since last May. This was May, 1927.

On examination, his feet were found to be congenitally broad and flat, and somewhat pronated. There was no swelling nor enlargement of joints. There were recent abrasions of the skin over the toes, as if from burns or blisters. There was a rather marked relaxation of the circulation of the feet, and the condition of which he complained was probably a circulatory one. The diagnosis I made at that time was, *1 pes planus and pronatus, bilateral, second degree marked without rigidity, but marked subjective symptoms.* It meant that he had very weak feet, and they are what are commonly called flat feet, but they were not of the extreme variety, intermediate, and that there had been no structural changes in the joints which makes the feet rigid and unflexible, and that he complained greatly of them. He did have some symptoms as pain and fatigue of his feet, probably pain in his legs; his feet bothered him a good deal. I also made a note, second diagnosis, circulatory disturbance in both feet, but I was unable to determine the cause at that time. I thought that it was due to having bandaged, strapped his feet a good deal, and having set up some swelling, and abrasion. It [40] had that appearance to me at that time, but I was not sure of it, and I would not say. On the occasion of this second examination, he was not

(Testimony of Dr. Edwin A. Hobby.)

permanently and totally disabled within that definition, which I have heard.

The third was not really an examination. He came into the office on March 26, 1929, and requested treatment, hospital treatment, and we are not obliged to make an examination for a record, except in so far as to satisfy ourselves that he is in need of hospital treatment, or that we think that hospital treatment is advisable, and we make a recommendation upon that. I simply made a note he was complaining of his feet swelling, and being stiff, and cold, and I referred to the records on file in the folder which I had before me for his condition, and especially to a report from the diagnostic center, which had just come in, I think, and I noticed that his condition was the same as reported on discharge from the hospital March 1, 1929; that is, the report from the diagnostic center was the same as the report on his discharge from the hospital, and I advised his going to the hospital for further treatment. I never advised amputation in his case; that question never came up, or entered my mind at any time that I saw him. I don't know what his condition is at the present time. I would not like to say without seeing him that his condition is one that necessitates amputation, or is likely to necessitate amputation, but with regard to the time that I saw him I would say that it was not necessary at any time when I saw him.

(Testimony of Dr. Edwin A. Hobby.)

Cross-examination.

(By Mr. McNAB.)

The report by Major Hoy of the Medical Corps at [41] the Presidio, and Major Marietta, which you have introduced in evidence here, in which they both diagnosed his trouble as this disease which has been described as thrombus angiitis obliterans, I neither agree nor disagree with that diagnosis, because I do not know. I would not want to say without an examination. I am perfectly willing to examine him now and say. I am quite satisfied that at the time I made the two or three examinations of him, he was not a victim of that disease at that time.

I have seen quite a few cases of thrombus angiitis obliterans that have come to the Veterans' Bureau and otherwise. It does not occur with great frequency. I expect I have seen twenty or thirty cases since I have been connected with the Bureau. During that period I have had under my observation several thousand cases; I have made several thousand examinations in the last eight years for the Veterans' Bureau, and out of those several thousand I presume I have had no more than somewhere about twenty who have been afflicted with thrombus angiitis obliterans. They are a very negligible percentage of the diseases. It is a general physical disease. It is progressive as a rule. It is a circulatory disease, an infectious disease of the blood vessels, impairing the circulation of the

(Testimony of Dr. Edwin A. Hobby.)

limbs. I could not say that I have known of a case of thrombus angiitis obliterans which when once fixed in the human form, has been cured. I have seen some cases that have been so-called, that have either become arrested or where a mistake in diagnosis has been made. I don't think that quiet, relaxation, and relief from pressure of the limbs would make any difference in the arresting of the disease. I cannot name a single case in my entire experience where any victim of that disease improved, or was cured while continuing [42] physical or other labor, nor any other way. I do not think it would make any difference if a man with thrombus angiitis obliterans went out here and worked with a pick and shovel.

After my examination I referred him to the Letterman Hospital for treatment. I do not remember anything about my asking him what was the matter with him and he said he did not know, at my examination, and my stating I really did not know what was the matter with him.

Mr. McNAB.—Q. Didn't you ask Mr. Burleyson what he thought was the matter with him, and didn't he reply he did not know?

A. Not that I know of.

Mr. WRIGHT.—Q. Didn't Mr. Burleyson ask that question of you, and didn't you tell him you did not know?

Mr. VAN DER ZEE.—Objected to as assuming something not in evidence, not proper cross-examination.

(Testimony of Dr. Edwin A. Hobby.)

Mr. WRIGHT.—I am asking him on cross-examination, testing his qualifications.

The COURT.—The objection will be overruled, and an exception.

The WITNESS.—A. I have no recollection of Mr. Burleyson asking me any such question, and I have no recollection that he did ask me such a question, or any reply that I made to him.

I don't know that I saw Mr. Burleyson before March 27, 1928; I saw him on March 26, 1929, on February 27, 1928, and December 15, 1926. Referring to February 27, 1928, I have no recollection of any conversation with him; I must have had some conversation, because I got his complaint at that time, and I put down all the complaint that he made; I do not recall recommending to him that he should go to Letterman Hospital. February 27, 1928, I made an examination [43] for compensation purposes, only, and the question did not come up as to hospitalization. I would say that I did not make any such statement as that to him.

TESTIMONY OF JOSEPH S. HART, FOR
DEFENDANT.

JOSEPH S. HART, called as a witness on behalf of the defendant, being first duly sworn, testified:

I am employed by the United States Veterans' Bureau as a physician; I have been with the Veterans' Bureau since the 21st of February, 1924.

(Testimony of Joseph S. Hart.)

I am a general practitioner. I made one examination of Sidney Burleyson, the plaintiff in this case. I have a record of my examination. May I use it? I examined him on February 27, 1928. I made a diagnosis at that time. Mr. Burleyson gave me a medical history of the case at that time. I have that history scattered through the examination. I also have it in answer to the details of claimant's disability since his service, and his present complaint. It is quite lengthy. Claimant's statement, only hospitalization since discharged from service was Southern Pacific Hospital, San Francisco, California, for operation on my eye, right, about February, 1923, operated for cataract on my right eye, remained in hospital for eye for six weeks. About three months after discharge from service to work as storeman, Mare Island Navy Yard, under civil service appointment; remained there for about one year, then to work for Southern Pacific Railroad Company as cashier in Dining-car, Hotel, and Restaurant Department, for five or six months—I beg your pardon—for nine months; then did nothing much for five or six months, then to Del Monte Hotel, in storeroom, for three months, then back after about two and a half months to Southern Pacific [44] Railroad Company, dining service, with lay-off several times until September 3, 1923, when he quit; after two months to work as assistant receiving clerk for the Emporium, San Francisco, until March, 1924, then to Fox Hotel, as hotel clerk, at Taft, California, for about eighteen months;

(Testimony of Joseph S. Hart.)

about June 15, 1926; then laid off until July 25, 1926, when to work at Lake Tahoe, as hotel clerk, until October 1, 1926, when season closed. Then about November 1, 1926, to Whitecomb Hotel, San Francisco, for one month, then laid off until about 8th of January, 1927, when to work at Granada Hotel, San Francisco, as night clerk, until about the 18th day of February, 1927, then laid off until about the 2d of April, 1927, then to Worth Hotel as night clerk, and have been employed there ever since—still employed as night clerk at Hotel Worth, San Francisco; no accident nor sickness since discharge from service. In the body of my report there is reference to some other sickness in between, which is not *give* at this time.

Present complaint: It's my arches, and also a breaking out on my toes—arches are broke clear down; it's the pain right under here, in the arches, both feet the same, right, directly under the ankle, right straight down, you might say; on the toes, as my feet swell, swell whenever stand on them for any length of time, its eczema. The eczema has been since some time about 1923, last part of 1923. That's only ailment that I have, just my feet. Then follows the report of physical examination—shall I read that?

On physical examination, I have the following record: Fairly erect, well developed generally, very muscular arms, more than well nourished. Color appears to [45] be excellent; but full blood report, including blood sugar determination will be

(Testimony of Joseph S. Hart.)

attached when received. Skin not remarkable; has an old well-healed appendectomy scar, three-quarters inch diameter, superficial scar in the side, upper, one-third left leg; except that over great toe and next toe left foot, and over second and third toes right foot are two small areas of what appear to be recent abrasions, at edge of area on toe left, next great toe is some of the superficial layer of skin which looks like there had been a definite blister here which had probably been chafed open, I do not find anything here on which to say eczema; these areas look to me like abrasions rather than skin disease. Claimant has tight bandage two and half or three inches around waist of each foot. He says that the bandages are because of fallen arches. He says the only skin involvement is on the toes; the areas of recent abrasions are small and all on the dorsal surface, none elsewhere. I am not requesting claimant to remove the bandages mentioned above in view of his story, and in view of the fact that his feet will be later examined and reported upon to-day by orthopedist; from what I see, especially in view of practically no pronation being present, and weight of individual, I am inclined to consider as probably congenital low arch feet rather than broken arches; but as I have not taken bands off, see orthopedist report of condition. Throat somewhat hyperemic, tonsils appear to have been removed. Teeth, fair condition, some repair, will be referred to dentist. Tongue not remarkable, very slightly coated. Lungs apparently

(Testimony of Joseph S. Hart.)

perfectly normal, no abnormalities detected by me, but because of general order will be referred to T. B. specialist for his examination, his report will be on page 3. Heart [46] action is of good strength, regular, no abnormal sounds or other abnormalities detected; no thrill. A. C. D. appears to be within normal limits. When sent to X-ray for chest, heart will also be included, so see X-ray for definite measurements. Claimant cannot exercise by jumping because of feet; he was, therefore, requested to exercise by stooping, hands above head to the floor, fifty times; this he did, and immediately after the heart rate was 96 G. S. R.; there was no evidence of nor any complaint of any distress, no cyanosis, no dispnea, no abnormalities of any kind detected, either when upright or recumbent. After exercising one minute heart rate 78 G. S. R.; after one and a half minutes rate is at pre-exercise rate of 72. Abdomen soft, very considerable fat, no masses made out, no distention, no tympanitis, no rumbling, no tenderness nor sensitiveness from palpation, no spasm, no rigidity; there is an old, well-healed surgical scar (appendectomy 1919), no hernea, no hemorrhoids.

Genitalia; there is a well-defined scar, old, on fraenum; the left testicle is also somewhat larger than right, and the left epididymus is somewhat indurated; claimant admits gonorrhoea lasting about three months in 1926; denies ever any other venereal disease. Extremities, see orthopedic report; from my examination slight abrasions tops of two toes

(Testimony of Joseph S. Hart.)

each foot; apparently comparatively recent; no eczema found; possibly congenital flat feet. Claimant is wearing tight bandages around waist of both feet; there is practically no pronation here. Nervous system, referred to N. P. examination. No Romberg. No tremers. Pupils round, equal, react to L. not tried for D. None equal. Right is apparently definitely hyperactive; *tende achilles* apparently right is a little more active than left. Superficial [47] glands not remarkable. No edema, no ascites, no jaundice. At the time of my examination it is my opinion that the plaintiff was able to follow continuously any substantially gainful occupation; as far as I could see any number of occupations.

Cross-examination.

(By Mr. McNAB.)

I found no reason why he should not take any of any number of occupations, running an elevator. From what there is here, yes, I would be willing to ride to the top of the Russ Building with him, in his condition, operating the elevator and standing on his feet. I could not say definitely how long that examination took; I should imagine it probably took up a matter of at least an hour. I do not recall seeing him before, nor so far as I am aware have I ever seen him since. My entire knowledge of his condition is based upon this one examination and what I have heard in the courtroom of his condition. I never at any time saw him perform or attempt to perform any kind of labor. I am

(Testimony of Joseph S. Hart.)

simply gaging it on my examination during this period of time. I have no way of knowing that if he were to stand upon his feet and engage in some physical exercise for six hours his feet would swell and become painful so that he could not any longer stand on his feet. On the basis of what I found, and from what I have heard at this particular time, I am stating that I do not see any reason why he should not keep on his feet; there is nothing to believe contrary to the evidence, that he was available for almost any work. I am not an orthopedist. I referred him to an orthopedist for an examination of his feet. I did not make any examination of the joints of his feet. I did not even take the bandages [48] off his feet. I did not make an examination of the joints of his feet, because the Government has men who are specialists along those certain lines. We have specialists available, and we refer every case to specialists. I saw this man from the general medical examiner's standpoint, and not a specialist. I do not pretend to be an orthopedist, skilled in the examination of the feet. I sent him to the orthopedist because of the fact that *is* claim involved the arches. As there are arch specialists there, it is not my function to do that. I do not pretend to be an arch specialist. I made no attempt to make the orthopedic specialist's examination. I was considering the whole body, and referred him to the specialist for that. I did not ask him to remove the bandages from his feet, because I referred him to the orthopedist.

(Testimony of Joseph S. Hart.)

The nature and extent of the falling and breaking of the arches, I make an entry that there is practically no pronation here. I did not conduct any examination by measurement and by scale of the pressure of his feet in that condition; I made no attempt to. I tried to go through the general examination of heart and lungs, and skin, as a general practitioner would. He came complaining about his feet. I made an examination of his heart. I did not find it here that he complained of his lungs. I made no examination of his feet but I made an examination of his lungs. I went over his body and found that he had had a cataract removed, had an operation for appendicitis, and had an operation for the removal of the tonsils, but he did not complain of any of those things, but the Government sent him to a general medical examiner for examination, and for the specialist's examination in addition. I referred him to somebody else for his feet, because it is not my function to examine him for that. [49]

He came to me complaining of the condition of his feet, and I made such an examination as that I have referred to. I did not attempt to diagnose the trouble in his feet except as to some abrasions and as to the skin condition. There had been something there on the surface of the toe some abrasion. He came to me with a complaint concerning his feet and I referred him to somebody that was thought to be a specialist qualified to pass on that subject. There are very few who are familiar with the

(Testimony of Joseph S. Hart.)

disease known to the medical profession as thrombus angiitis obliterans. I am not familiar with its treatment. I did not make any such diagnosis. I am not qualified to make a diagnosis of that disease as a specialist, I am not a specialist. I examined his feet enough to arrive at the conclusion that he could perform satisfactorily in a great number of occupations. I pointed out the fact that the condition of the skin was due to the tight bandaging. I do not believe I asked him whether these bandages were being applied under the direction of a surgeon, I don't know, I could not say.

Redirect Examination.

(By Mr. VAN DER ZEE.)

As a general practitioner I was able to observe the condition of his feet, although as a matter of precaution I recommended an examination by a specialist on feet.

(By Mr. McNAB.)

I absolutely disagree with the application of bandages around the feet. I don't know who applied them and that would make no difference, whatever. [50]

TESTIMONY OF P. J. MANGIN, FOR DEFENDANT.

P. J. MANGIN, called as a witness on behalf of the defendant, being first duly sworn, testified:

I am the examining physician for the Southern Pacific Railroad Company. Referring to the docu-

(Testimony of P. J. Mangin.)

ment which you show me, that is a photostatic copy of my signature. That is a copy of my signature to a copy of a report of a physical examination made by me of Sidney T. Burleyson. The date of that examination was July 6, 1926. Upon that examination I found that the heart and lungs are normal. In answer to the question of whether he had been injured and hurt, the reply was negative. In answer to the question of what illness he might have had, he said he had pneumonia, measles, mumps, and appendicitis in 1920. That is the entire history of his condition at that time. He was rejected on this occasion for employment by the Southern Pacific Company. There was an inflammation of the urethral orifice. There was a discharge of the urethral; I was not able to make any positive diagnosis, so I asked him to return in a few days, which would enable me to determine whether it was a simple affair, or not. He did not return, and, consequently his application was rejected. The reason he was rejected was because he failed to return. Basing my opinion upon the record which I have just referred to, bearing in mind this definition of total and permanent, as that disability which would prevent a man from following continuously any substantially gainful occupation, there was nothing that would have prevented me from accepting him at that time.

Cross-examination.

This examination probably consumed about fif-

(Testimony of P. J. Mangin.)

teen minutes. I presume he was there looking for a job, trying [51] to get employment. It was not the purpose that he call my attention to defects, or troubles. Whatever I found out in the way of troubles I found by extracting from him or by making a physical examination. I did not make any special examination of his feet. There was no examination made of his feet. It was generally restricted to his heart, lungs, the most important elements for the form of employment which our company might take him. Of course his gait was noticable when he walked in the room, but there was nothing to call my attention to any defect in his limbs in that way. He was not looking for a job from me but that was his purpose in being examined, he was an applicant for employment by the railroad. I have never seen him since. I do not know a thing about his condition at the present time.

TESTIMONY OF GEORGE R. CARSON, FOR DEFENDANT.

GEORGE R. CARSON, called as a witness on behalf of the defendant, being first duly sworn, testified:

The photostatic copy of the report you show me, that is my signature upon it. That is a report technically called by my company "Physical test record," upon the occasion of the application of Sidney T. Burleyson for employment and it indicates that I made a physical examination of him

(Testimony of George R. Carson.)

on August 23, 1920. He was applying for a position as cashier. I made a physical examination of him at that time. I examined the sight, first, which was found normal, and then we make a physical examination; it is rather a test, a kind of an inspection, we take the pulse, and then we ask him questions about his past sicknesses. We invariably ask "What past sicknesses have you had, or disabilities?"—so that we can record them here. You see, here, he says [52] appendicitis, and tonsils removed. There is nothing said here with reference to his feet. We ask that question, has he any present form of disability to hands, arms, feet, or legs? On the question as to his feet, I don't know that he gave me the answer "No." I put "No." He was present at the time and I was examining him at the time.

Cross-examination.

(By Mr. McNAB.)

He did not read that detailed document. This examination is rather an inspection, it is not an extensive examination. It requires just a few minutes. It is quite different from the examination which I would accord to a patient coming to me so as to be informed as to the condition of his health. There are no blood tests or minute examinations. He was not stripped, we make a practice of raising the clothes and lowering the pants. He was there for the purpose of being inspected, because he was an applicant for some kind of employment. He was not there complaining of trouble.

(Testimony of George R. Carson.)

Redirect Examination.

I did not hear the definition given here of permanent total disability. Assuming this definition of total and permanent disability as a condition where a man cannot follow continuously any substantially gainful occupation, in my opinion he was able to perform different duties at that time; I accepted him for the position; otherwise I would not have accepted him. Oh, yes, he must have walked into my office. [53]

Recross-examination.

(By Mr. McNAB.)

I never was advised that later, after being employed, he was compelled to discontinue his duties because he was unable to remain on his feet; I don't even know he was employed.

TESTIMONY OF E. E. RYDER, FOR DEFENDANT.

E. E. RYDER, called as a witness on behalf of the defendant, being first duly sworn, testified:

I am chief clerk, manager of Dining-car Department, Southern Pacific Company. In that capacity, I have charge of the personal records of the employees in that department. I know Mr. Burleyson, the plaintiff in this case. I have a record of his employment by the Southern Pacific Company between 1920 and 1923. He was first employed on August 25, 1920, as cashier, and retired on Septem-

(Testimony of E. E. Ryder.)

ber 6, 1920, re-employed September 14, 1920, and granted a leave of absence on June 22, 1921; he was re-employed on August 16, 1922, and released on November 1, 1922, and returned to duty on November 19, 1922, granted leave of absence February 16, 1923, returned to duty on March 8, 1923, laid off on May 20, 1923, and returned on June 3, 1923, and finally resigned on September 2, 1923. The first employment began on August 25, 1920, as cashier. That continued until June 22, 1921. The first job was about eleven days. This is a record of the Southern Pacific Dining-car and Hotel Service. It is made under my supervision. There were several different reasons given by the plaintiff for discontinuing that work; the first time he left the job was because it was a temporary [54] position; the second time he said that the weather was too hot, and he wished to be transferred to a cooler place; the third time it was another temporary position; the next time he had to go to the hospital for an operation on his eye; the next time it was a temporary position. The last time was because the country was too hot, and he was tired. The records do not show the amount of salary he was paid during that entire employment. The record does indicate how many days he spent upon those different jobs. The days of service are just as I have given them, I do not have the exact days. There service is intermittent, in and out, as he moved from one place to another, and laid off, and returned to duty. The only leave of absence indicated by the

(Testimony of E. E. Ryder.)

record by reason of illness is the eye operation that I have given.

Cross-examination.

(By Mr. McNAB.)

I don't know anything about the causes of his laying off and leaves of absence except what was reported to me. I did not talk to Mr. Burleyson himself about it, personally. As far as I know he might have laid off because of pain in his feet, or some other trouble. I am merely testifying from an official record that was handed in to me by some of my subordinates. It does not disclose an unusual number of absences and leaves of absence during employment, only once of his own accord. They were all short periods between re-employment, with one exception. I have given them to you.

Redirect Examination.

To a considerable extent those positions in their very nature, are temporary; we move them from one point to [55] another as they may be required.

TESTIMONY OF MISS M. GOUGH, FOR DEFENDANT.

MISS M. GOUGH, called as a witness on behalf of the defendant, being first duly sworn, testified:

I am in charge of the personnel records of the Emporium in this city. I have those records with me; I have the personal record of Mr. Sidney Bur-

(Testimony of Miss M. Gough.)

leyson, covering his employment during 1923 and 1924. His first employment by the Emporium was on September 21, 1923. The Emporium requires a physical examination before they go on what we call our regular roll. Mr. Burleyson was on our regular roll. He was a clerk in our receiving room. At that time he was on at \$80.00 a month, but later his salary was \$85.00. So far as I know he worked continuously at his position. The entire extent of his employment was from September 21, 1923, until May 16, 1924.

Cross-examination.

(By Mr. McNAB.)

There are no absences recorded. I don't know what hours he kept. I don't know anything about his physical condition when he was there. I don't know whether he was suffering or not. There would be a notation of it if he asked for leaves of absence and we have not any. I am merely testifying from records in my office. They show that his employment terminated on May 16, 1924. He resigned for a better position. I don't know where he went, or what position he went to. According to him it was a better position. I am only talking from the records, I don't know as a matter of fact that he went to any employment, but he resigned to go. [56]

Redirect Examination.

My records show, though, that it was a better position.

TESTIMONY OF A. L. LESSMAN, FOR DEFENDANT.

A. L. LESSMAN, called as a witness on behalf of the defendant, being first duly sworn, testified:

I am a director of Heald's Business College. I do not personally have charge of the attendance records of students at Heald's College, but they are kept under my supervision. I have a record of S. Burleyson. I do not know if that is the plaintiff in this case.

Mr. McNAB.—What is the period of time that you claim he was there?

Mr. VAN DER ZEE.—January 23 to May 17, 1924.

Mr. McNAB.—He says he went to Heald's during that time.

Mr. VAN DER ZEE.—Q. Will you just state the attendance record of S. Burleyson, the plaintiff in this case, during that time?

A. Well, he was regular in his attendance in the evening school. He missed six sessions of school, all together, during that period.

Cross-examination.

(By Mr. McNAB.)

He was there from January 23 to May 17, something less than four months; he went three times a week, I am quite sure of that. He went Monday, Wednesday and Friday. In that period of something less than four months he was absent for six

(Testimony of A. L. Lessman.)

sessions, I don't know for what reason. I did not observe him in the schoolroom particularly. Most of our students are seated; all of their studies are [57] conducted there, seated either on a chair or a stool.

TESTIMONY OF JOHN STEVENS, FOR DEFENDANT.

JOHN STEVENS, called as a witness on behalf of the defendant, being first duly sworn, testified:

I am an accountant at Tahoe Tavern. I was at that position in July, 1926; I know the plaintiff Sidney T. Burleyson; he was employed at Tahoe Tavern from June, continuously for about three months; he worked continuously, and his work was entirely satisfactory. His salary was \$125.00 a month and found. He was what you might call a front desk clerk; by that I mean that he passed keys out, sorted mail, and gave general information at the desk. I observed him practically daily during the time of that employment; he never complained to me of any disability or pain or make any complaint about his feet.

Cross-examination.

(By Mr. McNAB.)

Doctor Guy Wallace was the house physician at the hotel there; this was in June, 1926, June to October, 1926. To my knowledge Doctor Wallace

(Testimony of John Stevens.)

did not examine him while he was there; I don't know whether he did or not.

Mr. McNAB.—You don't know whether Doctor Wallace made a report to the Government as to his feet, do you?

Mr. VAN DER ZEE.—I object to that as not proper cross-examination.

Mr. McNAB.—Q. Do you know whether Dr. Guy Wallace conducted an examination there with respect to his feet?

Mr. VAN DER ZEE.—The same objection.

The COURT.—The objection will be overruled.
[58]

Mr. VAN DER ZEE.—Exception.

The WITNESS.—A. If he had made any examination for our insurance it would have come to my hands, and I received no such report. I don't know whether or not Doctor Wallace made a physical examination of him. Doctor Wallace was stationed there at the hotel and if there were any illness in the house it was his business to make examination.

Mr. McNAB.—I should like to offer in evidence from the Government files the two examinations by Doctor Wallace of this man.

Mr. VAN DER ZEE.—No *object*.

TESTIMONY OF F. PARRY, FOR DEFENDANT.

F. PARRY, called as a witness on behalf of the defendant, being first duly sworn, testified:

I am the auditor of the Whitcomb Hotel and in that capacity I have charge of the personal records of the employees. I have the record of employment of Sidney T. Burleyson; his first employment was October 20, 1926, as front clerk. He ended that employment on December 5, 1926. Our records show no reason given for the termination of that employment.

Cross-examination.

(By Mr. McNAB.)

My records do not show whether he quit of his own accord or not. My superior is Mr. Drury, one of the owners of the hotel. I never talked to him about this man's condition. I don't know that Mr. Drury was very kind to him. I know nothing whatever personally. He was there [59] all together just about five weeks. I have no indication about the termination of his employment of any nature. My records do not indicate that he terminated his employment of his own accord.

TESTIMONY OF MRS. GEORGIA S. MILLER,
FOR DEFENDANT.

Mrs. GEORGIA S. MILLER, called as a witness on behalf of the defendant, being first duly sworn, testified:

I am living at the Warrington Apartments. In 1927 I had charge of the Worth Hotel in San Francisco, and at that time I employed the plaintiff in this case, Sidney T. Burleyson, as a night clerk at \$125.00 a month. I have the records with me of the hotel showing the period of his employment. Referring to the records, he went to work, I think, about the 3d of April. I have it down here the 3d of April, 1927. He continued that employment until August 15, 1928. When he came to work there I interviewed him personally. He made no complaint about the condition of his feet. I never heard him complain about his feet, but about the 1st of January, 1928, he complained of ill health, but I don't remember that he ever told me that it was his feet. He did his work satisfactorily. I think there were one or two occasions when he was away for a few days. He worked for me for a period of over a year. He left me to go to the hospital for treatment, he told me.

Cross-examination.

(By Mr. McNAB.)

His work was night work; he came on at eleven o'clock and left at seven. During that period of the

(Testimony of Mrs. Georgia S. Miller.)

night of course necessarily there are very few people coming and going. During that period there was no reason why he could [60] not have been seated in a chair in the office. I never questioned it, because there is no reason why he could not. There was no reason for him to be around on his feet, at all. I knew of his ill health; I *felt* very highly of him. When he left it was to go to the Government Hospital for treatment. He was not much of a man to complain. I think on two occasions he had to hire another clerk in his place on account of illness. During those occasions he hired some other clerk and went away to get relief; and there were two occasions when it was necessary for him to apply for relief and finally went to the hospital to have treatment.

TESTIMONY OF SIDNEY T. BURLEYSON,
IN HIS OWN BEHALF (RECALLED IN
REBUTTAL).

SIDNEY T. BURLEYSON, the plaintiff, recalled on rebuttal:

I heard the testimony of Dr. Hobby on the stand some few minutes ago. About two or three days after I went to him for examination, in February, 1929, I went to the hospital. He sent me to the orthopedist. Well, he asked me what was the matter, on the occasion of that examination, so I asked him—I said, “You are the doctor.” I then asked him whether or not he could tell me what was the

(Testimony of Sidney T. Burleyson.)

matter with me. He turned around and started to juggle some papers and did not answer me. He never told me what was the matter with me. He did not make an examination of my feet, not since then.

Cross-examination.

(By Mr. VAN DER ZEE.)

He had made an examination of my feet prior to that date. At the time he examined me there were no bandages on my feet. He sent me to Letterman General Hospital. He did not tell me as to the length of treatment that I was to [61] undergo. I stayed in the hospital about four months. I requested to be released from the hospital. I did not see any change at all in my suffering after remaining in the hospital; I came out on crutches; when I went in I could go with a cane. I used crutches for the first time right after they took those bandages off my feet at Palo Alto. It was in the latter part of February, 1929.

While I was in the Base Hospital I was in plaster cases. It was painful; I had to have them taken off, they got so painful.

Mr. VAN DER ZEE.—I desire at this time to renew my motion for a directed verdict.

Mr. McNAB.—I will stipulate that you have renewed it.

Mr. VAN DER ZEE.—I desire to renew it formally upon the following grounds, that the evidence in this case, both of the plaintiff and the Govern-

ment, shows conclusively that the allegations of the complaint have not been established, in that plaintiff has been shown to have had continuous employment on several different jobs since the date of the lapsation of his policy; there is no evidence, whatever, in the record by plaintiff or anyone else that any condition of permanent and total disability existed during the period from 1919 to 1926, and as to the period from 1926 to date, there is shown only a partial disability, due to so-called flat feet; and upon all of the grounds I renew my motion at this time for a directed verdict in favor of the Government. I would like to add to my motion for a directed verdict the further ground that the disagreement which is required as a prerequisite to a suit has not been shown. [62]

The COURT.—At this time the Court will deny the motion for a directed verdict. The Court will, however, reserve the right, if for any reason the Court changes its mind between now and to-morrow morning at ten o'clock, to set aside the present ruling and reconsider the matter.

Mr. VAN DER ZEE.—Might I ask an exception to your Honor's ruling?

The COURT.—Yes.

(An adjournment was here taken until to-morrow, October 18, 1929, at ten o'clock A. M.)

Mr. VAN DER ZEE.—Before the argument is proceeded with I would like to make an additional motion in addition to the motion for a directed verdict, that this case be dismissed for want of

jurisdiction, the ground of the want of jurisdiction consisting in a failure of the evidence, both of plaintiff and defendant, to establish that there has been any disagreement between plaintiff and defendant as to the claim set forth in the complaint, or that there has been any denial of a claim of plaintiff for war risk insurance benefits by the Director of the Bureau of War Risk Insurance, or by the Veterans' Bureau.

The COURT.—The motion for a directed verdict will be denied.

Mr. VAN DER ZEE.—An exception in each case, if your Honor please.

The COURT.—The exception will be noted.

(Thereupon counsel proceeded to argue the case, at the conclusion of which the Court charged the jury as follows:) [63]

CHARGE TO THE JURY.

The COURT (Orally).—Gentlemen of the Jury: I will now instruct you with respect to the law of the case. Preliminary to the general instructions which I will read you are advised that you are the sole judges of the testimony, and the weight and credibility of witnesses; the law, however, you are to apply to the testimony, as given you by the Court.

Counsel upon both sides have argued the case. You are advised that arguments of counsel otherwise than as they may be of advantage to you in calling your attention to the evidence, are not to be given any further consideration. They are of assistance in weighing the testimony, and calling

to your attention important phases of the case. The same may be said of statements by the Court during the progress of the trial. I desire to particularly call your attention to certain rulings of the Court with respect to motions for an instructed verdict, or motions for a nonsuit. In those cases, the Court feels that the matter is a question of law. The Court at no time reviews or weighs the testimony or determines conflicts in testimony. Matters of conflict in testimony are solely for the jury, and as I said before, the matter of determining the credibility of witnesses is solely a matter for the jury.

In determining the credibility of witnesses, you have a right to consider their demeanor upon the witness-stand, their interest, if any, in the result of the case, and all of the inducements, with which you, as ordinary individuals, are impressed, governing persons in testifying with respect to the subject matter involved in the action. [64]

This case is now to be submitted to you for your decision as to whether plaintiff is entitled to recover on his complaint against the defendant. In deciding this question, you will determine, first, from the evidence, what the facts are, and then apply the facts as you find them, to the law as given you by the Court, and in that way reach a conclusion.

It is your duty to find what the facts are; the Court's duty to instruct you what the law is; and it is your further duty, according to your oaths, to find a verdict solely upon the facts as you find them, and upon the law as given you by the Court.

The subject matter of this suit is a claim upon a

contract of War Risk Insurance, and the action, itself, is for the sum of \$57.50 per month for each and every month, beginning July 10, 1919, and continuing thereafter so long as the plaintiff lives and continues to suffer his alleged permanent and total disability.

The claim for these payments is based upon a contract or policy of insurance issued by the Government to the plaintiff, while the plaintiff was in the service of the United States Marine Corps.

We may safely simplify the case by accepting as uncontroverted the following facts: That plaintiff, on July 30, 1918, was accepted for service in the United States Marine Corps, where he served as a private during the World War; that he was honorably discharged from such service on July 10, 1919; that while in the United States Marine Corps he contracted for and was granted a policy of insurance which is here sued upon in the amount of \$10,000 payable in the event he became permanently and totally disabled [65] while the policy was in force, in the amount of \$57.50 per month. This policy of insurance was a contract. The plaintiff's part of the contract was that he pay the monthly premiums thereon; in consideration of such payments, the defendant, the United States, agreed to pay the monthly insurance installments if he should suffer permanent and total disability during the life of the policy, in the amount of \$57.50 per month. The plaintiff paid all of the premiums due on the insurance up to July 10, 1919, the time of his discharge, and thereafter he continued to pay

the premiums for six months, or thereabouts, and the insurance was in force up to and including January 31, 1920. The plaintiff contends that before his policy lapsed by reason of nonpayment of the premiums, he became permanently and totally disabled, and that, therefore, by reason of such permanent and total disability, his insurance matured and he was not bound to pay any more premiums. The defendant says that this is not true. It contends that the plaintiff was not permanently and totally disabled at the time his insurance lapsed.

The issue in this case is not complicated. Is the plaintiff, Sidney T. Burleyson, permanently and totally disabled, and, if so, upon what date did he become permanently and totally disabled? If at any time, for any reason, he has become permanently and totally disabled while the policy was in force, then his policy matured and he was not required to make any further payments of premiums. You will, therefore, determine the fact, of which you are the sole judges, whether there was a disability or impairment of mind or body which rendered it impossible for him to follow continuously any substantially gainful occupation while the policy was in force. [66]

I charge you that permanent and total disability is any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation.

Total disability shall be deemed to be permanent whenever it is founded upon conditions which

render it reasonably certain that it will continue throughout the life of the person suffering from it.

The words "total" and "permanent" as applied to disability do not necessarily imply an incapacity to do any work at all, or that a person must be bedfast or bedridden. The ability to work or apply oneself spasmodically or intermittently for short periods of time does not meet the requirements, the intendment being that the injured party shall be able to adapt himself to some occupation, or pursuit, or employment, every part of which employment he can discharge, that will bring him continuous, gainful results—something that will be dependable for earning a livelihood. It is enough if there is such impairment of capacity as to render it impossible for the disabled person to follow continuously any substantially gainful occupation.

The word "continuously," as used in these instructions means without interruption, unbrokenly. However, it is to be taken in its ordinary, reasonable significance, as that word would be applied to employment in the business world, generally; it does not mean that a person must be able to be employed every hour, or every hour of even every working day. It does imply ability to compete with men of sound mind and body, and average attainments under the usual conditions of life.

If you find from the evidence that the plaintiff has had sufficient mental and physical capacity to earn a substantially [67] gainful living in any line of occupation whatever, you should find for the defendant.

The plaintiff is not entitled to recover merely upon proof that he is unable to follow his pre-war occupation.

To recover in this case, it is not enough for plaintiff to prove that he is totally disabled to hold a particular class of employment, but he must prove that he acquired, during the period that his insurance was in force, a continuous disability which totally disabled him from earning a continuous and substantially gainful wage from any kind of work, and that this disability is founded on conditions that render it reasonably certain that it will continue during the remainder of his life.

I charge you that unless you find from the evidence that plaintiff became totally and permanently disabled during the life of said policy, your verdict should be for the defendant.

If you find that plaintiff was not totally and permanently disabled at the time that his policy lapsed, but that he became so disabled at some later date, then your verdict should likewise be for the defendant.

Section 200 of the World War Veterans' Act, reads in part as follows:

“That for the purpose of this Act, every member employed in the active service who was discharged prior to July 2, 1921, shall be conclusively held and taken to have been in sound condition when examined, accepted and enrolled for service, except as to defects, disorders, or infirmities made of record in any manner by proper authorities of the United States

at the time of or prior to inception of active service, to the extent of which any such defect, disorder, or infirmity was so made of record.”

[68]

You may consider the fact of any employment which the plaintiff may have engaged in since his discharge from the Marine Corps, the nature of such employment, if any, the amount of salary received, whether or not the plaintiff gave satisfaction in such employment, and whether or not plaintiff was in fit physical condition to discharge his duties under such employment, in determining the extent and the date of occurrence of the plaintiff's disability, if any.

As permanency of any condition here, total disability, involves the element of time, the event of its continuance, during the passage of time is competent evidence to be considered with the other facts in the case.

The Court instructs you that the law does not penalize any man for making sincere efforts to overcome his physical or mental disabilities; therefore, if you believe from the evidence that although the plaintiff did attempt to work, and that he was only able spasmodically to do such work through heroic efforts on his part, or to the detriment of his health, you may consider such circumstances as evidence that the plaintiff was unable to follow continuously any substantially gainful occupation.

In civil cases the affirmative of the issue must be proven; the affirmative here is upon the plaintiff,

upon the plaintiff, therefore, rests the burden of proof.

You are the exclusive judges of the weight and sufficiency of the evidence.

I charge you that the burden is upon the plaintiff to establish that he was permanently and totally disabled upon the date that his insurance lapsed by reason of nonpayment of the premium. [69]

If evidence is contradictory, your decision must be in accordance with the preponderance thereof. When this cannot be accomplished, and the evidence is so equally balanced in weight and quality that the scales of truth hang even, your verdict should be for the defendant.

I charge you, therefore, that before any juror is warranted, under his oath, to assent to a verdict in favor of plaintiff, he must feel satisfied that the plaintiff's case has been established by a preponderance of evidence.

The term "preponderance of evidence" is not a mere figure of speech, nor is it to be lightly looked upon by a jury. It is a substantial right, given by law, that you cannot render a verdict against the defendant unless the plaintiff has established his or her case by a preponderance of evidence.

You are not bound to decide in conformity with the declarations of any number of witnesses who do not produce conviction in your minds, against a less number, or against evidence which satisfies your minds.

Motives of sympathy for the plaintiff, because of his present physical condition, however serious or

unfortunate it may be, are not to be considered by you in any degree in arriving at your verdict in this case.

Likewise, the fact that the plaintiff may have rendered patriotic service to our country during the late world war, is not to be considered by you in any respect in arriving at your verdict in this case.

Your verdict must be unanimous.

Two forms of verdict will be submitted to you. You are instructed that if you find that the plaintiff is totally and permanently disabled, that you will determine what [70] date the plaintiff first became totally and permanently disabled. And in this connection you are instructed that if you find that such disability occurred later than January 31, 1920, your verdict should be for the defendant. The complaint in this case alleges a disability existing from July 10, 1919. If you find for the plaintiff in the case, it will be necessary for you to determine some date between July 10, 1919, and January 31, 1920, at which such disability occurred. Otherwise, as I said before, your verdict should be for the defendant.

The two forms of verdict submitted to you will substantially be in the following form:

“We, the jury in the above-entitled cause, find for the plaintiff, Sidney T. Burleyson, and fix the date of his total or permanent disability from following continuously any substantially gainful occupation from ——.”

And, as I said before, if you find for the plaintiff, you will fix the date between July 10, 1919, and January 31, 1920, inclusive.

The next form of verdict submitted to you will read:

“We, the jury in the above-entitled cause, find in favor of the defendant.”

Upon your retirement, you will elect one of your number foreman. When you have agreed upon a verdict, the verdict will be signed by your foreman, you will notify the Marshal, and you will be returned into court.

Mr. McNAB.—Might I make a suggestion before the jury retires? It is alleged in our complaint that he was totally disabled as of the date of his discharge, July 10, 1919, although his policy continued in effect, as your Honor has just stated, until January 31, 1920, and it is so alleged throughout the complaint, but I notice, in glancing [71] at the complaint, while it is correct in every respect, when it comes down to the prayer we pray here for judgment on the basis of \$57.50 a month from the 10th of July, 1919, but through some inadvertence we allege the date of the disability through some error here, the 27th of July, 1928. I don't know how it got in, but I ask, before the jury retires, to have that part of the prayer amended on its face to read the 10th of July, 1919. That conforms to the allegations.

The COURT.—Yes.

Mr. McNAB.—I don't know whether it is considered permissible to submit a verdict with a date

in it, or not. I do not know whether the jury can remember these dates.

Mr. VAN DER ZEE.—It is a question of fact for the jury what the date was.

The COURT.—I think we will try the jury. I think the jury can remember.

Mr. McNAB.—Our contention is July 10, 1919.

The COURT.—The prayer of the complaint is from July 10, 1919, the date of the discharge. The policy continued in force in any event under payments of premium to January 31, 1920. I think I might advise the jury, so that there will be no misunderstanding, upon these insurance policies the claim of disability may occur at any time during the life of the policy. It is not even necessary that the disability grow out of war service. The policy continues, like every other policy, after the soldier has left the service, for the period of insurance. If the disability occurred at any time prior to January 31, 1920, under the instructions heretofore given you, then the verdict should be for the plaintiff.

[72]

I think the jury will be able to remember these dates. July 10, 1919, is the date prayed in the complaint. January 31, 1920, is the date on which the policy terminated, so far as the payments of the premium are concerned.

Mr. VAN DER ZEE.—Your Honor, might I take exceptions to the instructions at this time, first to Defendant's Proposed Instruction No. 8—your Honor gave the jury the first part of that instruc-

tion, and omitted the second part. Whether that was through inadvertence, or not, I do not know.

The COURT.—That was not given.

Mr. VAN DER ZEE.—Intentionally?

The COURT.—Yes.

Mr. VAN DER ZEE.—I, therefore, take an exception, if your Honor please, to the Court's refusal to give the second paragraph of Defendant's Proposed Instruction No. 8, and I also take an exception to the Court's giving of the instructions of plaintiff—plaintiff's instructions are not numbered. I suppose I will have to read them, your Honor. Plaintiff's instruction reads as follows:

“The Court instructs you that the law does not penalize any man for making sincere efforts to overcome his physical or mental disabilities”—

I desire to except to the Court's giving that part of the instruction upon the ground that is not a correct statement of the law, and prejudicial.

The COURT.—The exception will be noted.

Mr. McNAB.—We have no exceptions to any of the instructions, your Honor.

The COURT.—The jury may retire. [73]

(Thereupon the jury retired and subsequently returned into court with a verdict in favor of the plaintiff.)

Dated: ———, 1930.

Attorneys for Plaintiff.
GEO. J. HATFIELD,
United States Attorney,
Attorney for Defendant.

ORDER APPROVING AND SETTLING BILL
OF EXCEPTIONS.

The foregoing bill of exceptions is duly proposed and agreed upon by counsel for the respective parties, is correct in all respects, and is hereby approved, allowed and settled and made a part of their record herein, and said bill of exceptions may be used by either parties plaintiff or defendant, upon any appeal taken by either parties plaintiff or defendant.

Dated:

FRANK H. NORCROSS,
United States District Judge. [74]

[Title of Court and Cause.]

STIPULATION AND ORDER EXTENDING
TIME AND TERM WITHIN WHICH TO
FILE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED by and between the parties to the above-entitled action, that for the purpose of settling, signing and filing the bill of exceptions in the said case the July, 1929, term of

the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 8 of the Rules of this Court, be extended to and into and so as to include the March, 1930, term of said court to the 7th day of April, 1930, thereof, and

IT IS FURTHER STIPULATED that all of plaintiff's proposed amendments to defendant's proposed bill of exceptions be allowed with the exception of Amendment Number One, which is disallowed.

JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Plaintiff.
GEO. J. HATFIELD,
United States Attorney,
Attorney for Defendant.

It is so ordered.

FRANK H. NORCROSS,
United States District Judge.

Service of the within bill of exceptions by copy admitted this 15th day of March, 1930.

JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Defendant.

[Endorsed]: Filed Mar. 31st, 1930. [75]

[Title of Court and Cause.]

PLAINTIFF'S PROPOSED AMENDMENTS
TO DEFENDANT'S PROPOSED BILL
OF EXCEPTIONS.

AMENDMENT No. ONE: Strike out the words "written or otherwise," line 32, page 26, and insert in lieu thereof: "Except an oral denial."

AMENDMENT No. TWO: Strike out the words "you tell him" on line 13, page 37, upon the ground that said words are a repetition of said words.

AMENDMENT No. THREE: After the word "man," line 11, page 53, insert the two examinations by Doctor Wallace, with the order or ruling of the Court permitting the admission into evidence of said examinations.

AMENDMENT No. FOUR: After the word "reading," line 17, page 30, insert the report of Major Mariella, together with the order or ruling of the Court admitting the same in evidence.

AMENDMENT No. FIVE: After the word "reading," line 20, page 30, insert the diagnosis of Doctor M. T. Maynard, at the Veterans' Bureau, with the ruling of the Court admitting the same in evidence.

WHEREFORE, plaintiff prays that his proposed amendments to defendant's proposed bill of

exceptions be allowed and made a part of the bill of exceptions in the above-entitled action.

JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Plaintiff.

Dated: March 18, 1930.

Service of a copy of the within admitted this 19th day of March, 1930.

GEO. J. HATFIELD,
U. S. Attorney.

[Endorsed]: Filed Mar. 31, 1930. [76]

[Title of Court and Cause.]

VERDICT OF THE JURY.

We, the jury in the above-entitled cause, find for the plaintiff, Sidney T. Burleyson, and fix the date of his total and permanent disability from following continuously any substantially gainful occupation from July 10, 1919.

October 18th, 1929.

OTIS R. JOHNSON,
Foreman.

[Endorsed]: Filed October 18th, 1929, at 12 o'clock noon. [77]

In the Southern Division of the United States District Court, for the Northern District of California.

No. 18,430.

SIDNEY T. BURLEYSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT.

This cause came on regularly to be tried before the above-named court, Hon. Frank H. Norcross, Judge presiding, on the 16th day of October, 1929, at the hour of ten o'clock A. M., John L. McNab and S. C. Wright appearing as counsel for the plaintiff, and Messrs. George J. Hatfield, United States Attorney, and Herman Van Der Zee, Assistant United States Attorney for the Northern District of California, appearing as counsel for the defendant; that a jury of twelve persons was regularly impaneled and sworn to try said cause. Witnesses on the part of plaintiff and defendant were sworn and examined and documentary evidence on behalf of the parties hereto was introduced; after hearing the evidence, the arguments of counsel and the instructions of the Court, the jury retired to consider their verdict, and subsequently returned into court their verdict in words and figures as follows, to wit:

“We, the jury in the above-entitled cause, find for the plaintiff, Sidney T. Burleyson, and fix the date of his total and permanent disability from following continuously any substantial gainful occupation from July 10, 1919.

OTTO R. JOHNSON,
Foreman.”

Oct. 18, 1929.

And the Court having fixed plaintiff's attorneys' fees in the amount of ten per centum (10%) of the amount of [78] insurance sued upon and involved in this action,—

IT IS ORDERED, ADJUDGED AND DECREED that Sidney T. Burleyson, plaintiff, do have and recover of the United States of America the sum of Seven Thousand and Seventy-two and 50/100 Dollars (\$7,072.50), as accrued monthly installments of insurance at the rate of Fifty-seven and 50/100 Dollars (\$57.50) per month, beginning July 10th, 1919.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the defendant, United States of America, deduct ten per centum (10%) of the amount of insurance sued upon and involved in this action and pay the same to John L. McNab and S. C. Wright, plaintiff's attorneys, for their services rendered before this court, payable at the rate of one-tenth (1/10) of all back payments and one-tenth (1/10) of all future payments which may hereafter become due on account of said insurance said amounts to be paid by the United States Veterans' Bureau to said John L. McNab

and S. C. Wright out of any payments to be made to Sidney T. Burleyson, or his beneficiary in the event of his death before two hundred and forty (240) of said monthly installments have been paid.

Judgment entered October 18th, 1929.

WALTER B. MALING,
Clerk. [79]

[Title of Court and Cause.]

PETITION FOR APPEAL.

The United States of America, defendant in the above-entitled action, by and through Geo. J. Hatfield, United States Attorney for the Northern District of California, feeling itself aggrieved by the judgment entered on the 18th day of October, 1929, in the above-entitled proceedings, does hereby appeal from the said judgment to the Circuit Court of Appeals for the Ninth Circuit, and prays that its appeal may be allowed, and that a transcript of the record of proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: January 17, 1930.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed Jan. 17, 1930. [80]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the United States of America, defendant in the above-entitled cause, being the appellant herein, by and through Geo. J. Hatfield, United States Attorney for the Northern District of California, and in connection with its petition for appeal therein and the allowance of the same, assigns the following errors which it avers occurred at the trial of said cause and which were duly excepted to by it and upon which it relies to reverse the judgment herein:

I.

The District Court erred in denying defendant's motion for nonsuit at the close of plaintiff's case herein upon the following grounds, to wit: First, that the plaintiff's evidence in the case had not established a *prima facie* case and was legally insufficient to sustain a verdict, and second, on the ground that the evidence showed that no disagreement between the plaintiff and the United States Veterans' Bureau existed and that therefore the court had no jurisdiction of the subject matter of the action. [81]

II.

The District Court erred in denying defendant's motion for a directed verdict made at the close of all the evidence in said cause, upon the following grounds, to wit:

1. On the ground that the evidence in this case had not established a *prima facie* case for the plaintiff, and was legally insufficient to sustain a verdict.

2. On the ground that the evidence in this case proved conclusively that the allegations of the complaint have not been established in that plaintiff has been shown to have had continuous employment on several different occasions since the date of the lapse of his policy, and in that there is no evidence whatsoever in the record that any condition of permanent and total disability existed during the period from the time of the lapse of plaintiff's said policy up to the year 1926, and as to the period from 1926 to the date of trial, the evidence shows at the most only a partial disability due to so-called flat feet.

3. On the ground that the evidence showed that the Court had no jurisdiction on the subject matter of this action for the reason that the evidence showed that there did not exist before or at the time of trial a disagreement between the United States Veterans' Bureau and the plaintiff as is required by law as a prerequisite to suit.

III.

The District Court erred in instructing the jury as follows:

“The court instructs you that the law does not penalize any man for making sincere efforts to overcome his physical or mental disabilities; therefore, if you believe from the evidence that although the plaintiff did at-

tempt to work, and that he was only able spasmodically to do such work through heroic efforts on his part, or to the [82] detriment of his health, you may consider such circumstances as evidence that the plaintiff was unable to follow continuously any substantially gainful occupation.”

To which instruction the defendant took exception at the time of the trial herein.

IV.

The District Court erred in refusing to give the second paragraph of defendant's proposed instruction No. 8, which instruction read as follows:

“You may consider the fact of any employment which the plaintiff may have engaged in since his discharge from the Marine Corps, the nature of such employment, if any; the amount of salary received; whether or not the plaintiff gave satisfaction in such employment, and whether or not plaintiff was in fit physical condition to discharge his duties under such employment, in determining the extent and the date of occurrence of the plaintiff's disability, if any.

“If you find that the plaintiff held various positions for a considerable period of time since his said discharge from the Marine Corps, and received the ordinary compensation paid to persons employed in similar occupations, and gave entire satisfaction during that

time, that would be engaging in a gainful occupation continuously, and should be considered by you in arriving at your verdict.”

To which refusal to give said second paragraph of said instruction the defendant took exception at the time of the trial herein.

V.

The District Court erred in entering judgment on the verdict herein when the evidence adduced at the trial of this action was insufficient to sustain the verdict or judgment.

WHEREFORE, defendant prays that its appeal be allowed, that this assignment of errors be made a part of the [83] record in its cause, and that upon hearing of its appeal the errors complained of be corrected and the said judgment of October 18, 1929, may be reversed, annulled and held for naught; and further that it be adjudged and decreed that the said defendant and appellant have the relief prayed for in its answer, and such other relief as may be proper in the premises.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Defendant and Appellants.

[Endorsed]: Filed Jan. 17, 1930. [84]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND THAT NO
SUPERSEDEAS AND/OR COST BOND
BE REQUIRED.

Upon reading the petition for appeal of the defendant and appellant herein, IT IS HEREBY ORDERED that an appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore filed and entered herein be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that no bond on this appeal, or supersedeas bond, or bond for costs or damages shall be required to be given or filed.

Dated: January 17th, 1930.

(S.) FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Jan. 17, 1930. [85]

[Title of Court and Cause.]

STIPULATION RE SENDING EXHIBITS TO
CIRCUIT COURT OF APPEALS.

IT IS HEREBY STIPULATED by and between the parties hereto that each of the exhibits introduced in evidence in the trial of the above-

entitled action, particularly mentioned in plaintiff's proposed amendments to defendant's proposed bill of exceptions, amendments numbers three, four and five thereof, be sent to the Circuit Court of Appeals for the Ninth Circuit to be used in the appeal of the above-entitled action by the said Appellate Court and to be printed as part of the transcript on appeal, and to be deemed part of the bill of exceptions.

Dated: March 31, 1930.

JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Plaintiff.
GEO J. HATFIELD,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed April 2, 1930. [86]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Sir: Please prepare a transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the appeal heretofore sued out and perfected to said court, and include in said transcript the following pleadings, proceedings, and papers on file, to wit:

1. Complaint.
2. Answer.
3. Petition for appeal.
4. Assignment of errors.
5. Order allowing appeal and that no super-
sedeas and/or cost bond be required.
6. Citation on appeal.
7. Bill of exceptions.
8. Stipulation and order extending time and term
within which to file bill of exceptions of
March 28, 1930.
9. Plaintiff's proposed amendments to defend-
ant's proposed bill of exceptions.
10. Stipulation *re* sending exhibits to Circuit
Court.
11. Verdict and judgment.
12. This praecipe.

GEO. J. HATFIELD,

Attorney for _____,

[Endorsed]: Filed Mar. 31, 1930. [87]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 87 pages, numbered from 1 to 87 inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe and amended praecipe for record on appeal, as the same

remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$36.50, that the said amount will be charged against the United States in my next quarterly account and the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 16 day of June, A. D. 1930.

[Seal] WALTER B. MALING,
Clerk United States District Court for the North-
ern District of California. [88]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States of America,
to Sidney T. Burleyson, GREETING:

YOU ARE HEREBY CITED AND AD-
MONISHED to be and appear at a United States
Circuit Court of Appeals for the Ninth Circuit, to
be holden at the City of San Francisco, in the State
of California, within thirty days from the date
hereof, pursuant to an order allowing an appeal, of
record in the Clerk's office of the United States
District Court for the Northern District of Cali-
fornia, wherein the United States of America is ap-

pellant and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Northern District of California, this 17th day of January, A. D. 1930.

FRANK H. KERRIGAN,
United States District Judge.

Receipt of a copy reserving all objections by copy admitted this 18th day of Dec., 1930.

JOHN L. McNAB,
S. C. WRIGHT,
Attorneys for Appellant.

[Endorsed]: Filed Jan. 18, 1930. [89]

[Endorsed]: No. 6167. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Sidney T. Burleyson, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division. Filed June 16, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.